SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

DEAN FOODS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

FEDERAL TRADE COMMISSION, Petitioner

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, Respondents

EMERGENCY PETITION FOR PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER, AND OTHER RELIEF IN AID OF THE JURISDICTION OF THE COURT—Filed December 30, 1965.

The Federal Trade Commission, acting through its attorneys, petitions this Honorable Court for a preliminary injunction and other relief in aid of the jurisdiction of the Court, pursuant to 28 U.S.C. § 1651 (a).

I. Respondents

1. Dean Foods Company (hereafter "Dean") is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 3600 River Road, Franklin Park, Illinois. Dean, directly and through various wholly-owned subsidiaries, is a large, regional producer of packaged milk, other dairy products and non-dairy food products. The company operates nine dairy products plants, seven other food processing plants, [fol. 2] and a number of sales offices. Its products are distributed in parts of Illinois, including the area in and around Chicago, Illinois; parts of Kentucky, Michigan, Tennessee, and Wisconsin; and substantially the entire States of Arkansas and Indiana. Dean is approximately the twelfth largest dairy company in the United States, with 1964 sales of $73 million. Dean is the third or fourth largest seller of packaged milk in and around Chicago, Illinois.

Dean carries on business in the Seventh Circuit within the meaning of Section 11(c) and the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c), 45(c). It is engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

2. Bowman Dairy Company (hereafter "Bowman"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 140 W. Ontario Street, Chicago, Illinois. Bowman, directly and through various subsidiaries, is a large, regional producer of packaged milk and other dairy products. The company operates eight packaged milk plants, three ice cream manufacturing plants, three other dairy products processing plants, and a number of distribution facilities and sales offices, including eight distribution branches in and around Chicago, Illinois. It distributes its products in parts of Illinois, Wisconsin, Iowa, Michigan, Ohio, Indiana and Kentucky, but the bulk of its sales are [fol. 3] made in and around Chicago, Illinois. Bowman is approximately the eleventh largest dairy company in the United States, with 1964 sales of about $77 million. Bowman is the largest or second largest seller of packaged milk in and around Chicago, Illinois.

Bowman carries on business in the Seventh Circuit within the meaning of Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c), 45(c). It is engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

II. Jurisdiction

3. The respondents entered into a "Purchase Agreement" (Exhibit B) with one another, on December 13, 1965. This agreement provides that Bowman sell to Dean, Bowman's accounts receivable; inventories; plants and equipment; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; "the benefit of all relationships with suppliers and customers"; all customer and supplier lists; and various other tangible and intangible assets. By the terms of the agreement, the transfer of legal title to these assets was scheduled to take place on

January 3, 1966, but by agreement of counsel this date is now January 10, 1966.

4. The Federal Trade Commission, having reason to believe that the agreement between the respondents violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, on December 20, 1965, issued its complaint against the respondents. Exhibit A.

[fol. 4] 5. The United States Court of Appeals for the Seventh Circuit is a Court of Appeals having jurisdiction to review any final order entered by the Federal Trade Commission in respect to the merger agreement between the respondents. Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), provides that review may be obtained in "any circuit within which such violation occurred or within which such person resides or carries on business"; Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c), provides that review may be obtained "within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business." Each respondent carries on business within the Seventh Circuit and the violation occurred, and the acts or practices in question took place, within the Seventh Circuit.

6. The "all writs" statute, 28 U.S.C. § 1651(a), authorizes the Courts of Appeals to "issue all writs necessary or appropriate in aid of their respective jurisdiction." The Federal Trade Commission alleges, as described below in greater detail and supported by the affidavits annexed hereto, that the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits. The effect of consummation of the acquisition thus may well be to prevent the Commission from issuing any effective final [fol. 5] order for this Court to review and to hinder the Court's issuing its own order in the premises. The Comission therefore petitions this Court to exercise its discretion under § 1651(a) to issue an appropriate writ in aid of its jurisdiction.

III. The Probable Anticompetitive Effects of the Merger

7. As demonstrated in the affidavit of Scott A. Walker, Federal Trade Commission economist and an expert on the dairy industry, Exhibit C, this acquisition will have serious anticompetitive effects on the packaged milk business in the Chicago Area. Dean, the third ranking firm in that area will eliminate its largest single competitor. The combined market shares of the merging firms total about 23%, a figure nearly as large as the 30% combined market shares which the Supreme Court held to raise the presumption of illegality, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364-7 (1963).

The Dean-Bowman merger will also result in a substantial increase in over-all concentration in the packaged milk business in the Chicago Area. The 42% of the market now parceled out among the four leading firms will be shared by only three after the merger. As the Supreme Court pointed out in *Brown Shoe Co.* v. *United States*, 370 U.S. 394, 315 (1962), "the dominant theme pervading congressional consideration of the 1950 amendments [to Section 7 of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy."

[fol. 6] It is clear that these facts establish a *prima facie* violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On the basis of these facts, the Commission determined that it "had reason to believe" that such violations had been committed, and that "a proceeding in respect thereof would be to the interest of the public"; accordingly, it issued its complaint. See Exhibit A, p. 1. In the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation of these laws.

IV. Need for Preliminary Injunction

8. Counsel for Dean have informed counsel for petitioner that the present closing date for the acquisition of Bowman's assets by Dean is January 10, 1966. The acquisition agreement provides that on the closing date, Bowman will deliver to Dean bills of sale, certificates of title, and other

documents of conveyance, and instruments of assignment and transfer with respect to all assets purchased under the agreement, together with all books of accounts, and other papers and documents of Bowman. The agreement also provides that on the closing date Dean will deliver its certified check to Bowman in part payment for the purchased assets, together with instruments evidencing Dean's assumption of Bowman's liabilities.

[fol. 7] 9. The attached affidavit of Harry Bender, Chief of the Commission's Division of Economic Evidence, Exhibit D, leaves little doubt that the need for preliminary relief in this case is compelling. Restoration of Bowman as a viable independent will be "extremely difficult and very probably impossible" if the acquisition is allowed to be completed on January 10, 1966. The acquisition itself will split Bowman in two—Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments. As soon after the acquisition as is practicable, Dean will dispose of certain Bowman plants and equipment and will consolidate the operations of the companies in Chicago and other markets. Bowman as an entity will no longer exist.

10. The Federal Trade Commission is without jurisdiction to prevent the destruction of Bowman as a viable independent entity. Subsequent prosecution of the merger under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act can hardly be expected to terminate with any order effectively satisfying the needs of the public interest. This Court will, in effect, be deprived of its appellate jurisdiction and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis*—Bowman—will have vanished.

[fol. 8] Wherefore, petitioner prays that the Court issue a preliminary injunction enjoining the respondents from carrying out their agreement until entry of a final order in respect to the Commission's pending administrative proceeding; that the Court issue a temporary restraining order enjoining the respondents from carrying out their agreement until the Court has ruled upon this petition

for preliminary injunction; and that petitioner have such other and further relief as the nature of the case may require and the Court may deem just and proper.

Respectfully submitted, /s/ James McI. Henderson, General Counsel. /s/ James B. Truly, Assistant General Counsel for Appeals. /s/ Federick H. Mayer, /s/ Richard H. Stern, /s/ Peter K. Bleakley, /s/ Mark W. Haase, /s/ Robert M. Johnson, Attorneys, Federal Trade Commission, Washington, D. C. 20580.

[fol. 9] Certificate of Service (omitted in printing.)

[fol. 10] EXHIBIT A

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

Docket No. 8674

In the Matter of

DEAN FOODS COMPANY, a corporation.

BOWMAN DAIRY COMPANY, a corporation.

Complaint

The Federal Trade Commission, having reason to believe that the above-named respondents have violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be to the interest of the public; issues this complaint, stating its charges as follows:

I

Definitions

1. For purpose of this complaint, the following definitions are applicable:

(a) "Packaged milk" consists of bottled milk and other packaged milk and related products, such as whole milk, skim milk, cream, half and half (usually packaged in cardboard cartons), whipped topping with a butter-fat base (usually packaged in aerosol cans), and whole milk in bulk cans for hotels, restaurants or institutions. This definition corresponds to Bureau of Census Standard Industrial Classification (S.I.C.) product code 20262.

(b) "The Chicago Area" consists of Cook, DuPage, Lake, Kane and Will Counties, Illinois, and Lake County, Indiana. This area corresponds to the Chicago Federal Milk Marketing Order Area administered by the Department of Agriculture.

[fol. 11] II

Respondent

2. Respondent, Dean Foods Company (hereafter "Dean"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 3600 River Road, Franklin Park, Illinois.

3. Dean, directly and through various wholly-owned subsidiaries, is a large regional producer of packaged milk, other dairy products and non-dairy food products. The company operates nine dairy products plants, seven other food processing plants, and a number of sales offices. Its products are distributed in parts of Illinois, including the entire Chicago Area; parts of Kentucky, Michigan, Tennessee, and Wisconsin; and substantially the entire States of Arkansas and Indiana. In 1964, Dean had sales of $73 million, total assets of $25 million, and net income of $2.8 million before taxes. Dean is approximately the twelfth largest dairy company in the United States.

4. Dean is a profitable and growing company. Since 1959, Dean's sales have grown at an average rate of 7% per year. Dean's net income after taxes has been consistently high in the past five years, averaging 9.5% to 13.5% of net stockholder investment. The recent rapid growth of Dean has been accomplished principally by acquisitions of other dairy and non-dairy companies. Although Dean's total sales increased by $21.6 million between 1959 and 1964, the sales of the companies acquired by Dean in that period exceeded $23.5 million.

Since 1960, Dean acquired the following dairy products companies:

Acquired Company	Year Acquired	Annual Sales at Time of Acquisition
Sunshine Dairy Co., Lafayette, Ind.	1960	$3,000,000
Forest Hill Dairies, Memphis, Tenn.	1960	6,000,000
Shady Lane Dairy, Alpena, Mich.	1964	300,000
Kalamazoo Creamery, Kalamazoo, Mich.	1964	1,200,000
Liberty Dairy, Big Rapids, Mich.	1965	3,000,000

[fol. 12] 5. Dean is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

III

Bowman Dairy Company

6. Respondent, Bowman Dairy Company (hereafter "Bowman"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 140 W. Ontario Street, Chicago, Illinois.

7. Bowman, directly and through various subsidiaries, is a large regional producer of packaged milk and other dairy products. The company operates eight packaged milk plants, three ice cream manufacturing plants, three other dairy products processing plants, and a number of distribution facilities and sales offices, including eight distribution branches in the Chicago Area. It distributes its products in parts of Illinois, Wisconsin, Iowa, Michigan, Ohio, Indiana and Kentucky, but the bulk of its packaged milk sales are made in the Chicago Area. In 1964, Bowman had sales of $77.6 million, total assets of $27.2 million, and a net income of $347,000 before taxes. Bowman is approximately the eleventh largest dairy company in the United States.

8. For many years, Bowman has been the largest or second largest seller of packaged milk in the Chicago Area. In 1964, it enjoyed 16% of such sales. Recently, however, Bowman has experienced operating losses and its sales in the Chicago Area have declined, despite the fact that its operations in other areas have consistently yielded profits and have shown steady increases in sales volume. On October 9, 1965, in an attempt to retain its position in the Chicago packaged milk market, Bowman acquired Capitol Dairy Company, a Chicago firm with annual sales of $9 million.

9. Bowman is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

[fol. 13]

IV

Trade and Commerce

A. Generally

10. The packaged milk industry consists of dairies primarily engaged in the processing of fresh whole milk for the manufacture of bulk and packaged milk. The value of the shipments of packaged milk in the United States amounted to $4.1 billion in 1963. Packaged milk represents approximately 83% of the value of shipments of all fluid milk, the remainder being composed of bulk shipments. Packaged milk represents approximately 44% of the value of shipments of all dairy products.

11. Packaged milk is sold by dairies (i) to retail food stores for resale, (ii) to institutions, (iii) direct to homes, and (iv) to jobbers. Sales by dairies to retail stores and institutions represent "wholesale" sales. Sales by dairies directly to homes represent "retail" sales. Sales made by dairies through jobbers subsequently involve primarily retail sales.

12. The dairy industry is composed of a few very large national and regional concerns and a large number of very small ones. Since World War II, large national and regional dairy companies have acquired hundreds of independent dairy companies. Significant technological changes in the dairy industry have tightened the competitive pressure on the smaller producers, made efficient operation an increasingly expensive proposition in the dairy industry and have caused a high mortality rate among small dairies. For the foregoing reasons, between 1958 and 1963, the number of packaged milk processing establishments in the United States decreased from 5,816 to 4,624, or at an average rate of decrease compounded annually, of over 4%, even though packaged milk sales rose during this period at an average rate, compounded annually, of approximately 1%.

13. Concentration at the national level in the production and sale of packaged milk and other dairy products has reached formidable levels. In 1958, the eight largest companies had 31% of the value of shipments of packaged milk in the United States. Acquisitions subsequent to 1958 and

continuing declines in the number of independent dairies indicate that the level of concentration is rising.

[fol. 14] 14. Increasing barriers to entry in the packaged milk industry, increasing levels of concentration (resulting largely from acquisitions by large national and regional dairy companies), and the consequent decline in the total number of dairy companies, have increased the importance of preserving significant regional competitors like Bowman, which are the firms best able to offer competition to the large national companies.

15. The absorption and elimination of significant regional dairies by acquisition and merger has an adverse competitive effect beyond the direct elimination of actual or potential competition between the acquired and acquiring firms—particularly where the acquiring company is strong in a number of other markets. The Commission's experience with the dairy industry, and other industries, requires it to take notice that a firm strongly entrenched in a number of markets may thereby be able to engage in deep, sustained and discriminatory price cutting in selected markets to the detriment of weaker competitors. In the hands of a powerful firm, able to sustain selective price cuts for so long as may be necessary to insure against a loss of trade, the Commission has found such price cutting to be a potent weapon for repulsing new competition and preventing expansion of smaller rivals.

B. The Chicago Area

16. The Chicago Area is one of the largest markets in the United States for the consumption of packaged milk. The Chicago Area is also the largest consumer market in the United States which is regulated under a Federal Milk Marketing Order.

17. The four largest dairy companies in the Chicago Area account for some 43% of the sales of packaged milk. The remaining dairy companies in the Chicago Area are vastly inferior in size to the Big Four and enjoy individual market shares which are much smaller.

18. In 1964, Bowman was the largest or second largest distributor of packaged milk in the Chicago Area, with 16% of all sales. Bowman's acquisition of Capitol Dairy Company in October of 1965 further increased its already formidable market position in the Chicago Area.

[fol. 15] 19. In 1964, Dean was the third or fourth largest distributor of packaged milk in the Chicago Area, with approximately 7.2% of all sales. Dean's share of packaged milk sales in the Chicago Area has risen substantially since 1960, when its share was only 5.8%.

20. Wholesale packaged milk sales, especially sales to supermarkets, are highly sought after by dairy companies in the Chicago Area. Because such business is highly profitable, supermarket chains are regarded as choice outlets, particularly because of the practice of handling such accounts on an exclusive, or full requirements, basis. On the other hand, retail home-delivery sales, because of increasing delivery costs and a decreasing number of customers per route, are regarded by dairy companies as the less desirable segment of the packaged milk market in the Chicago Area.

21. In 1963, four large grocery chains controlled 52% of grocery store sales in the Chicago Standard Metropolitan Statistical Area (Cook, DuPage, Kane, Lake, McHenry and Will Counties, Illinois), and a like percentage of packaged fluid milk sales made by grocery stores in the Chicago Area. These four grocery chains control a significantly larger share of supermarket sales and of packaged fluid milk sales by supermarkets in the Chicago Area. Each of the four largest companies in the Chicago Area is the exclusive supplier of packaged milk to one of the four largest grocery chains in the Chicago Area. Smaller dairy companies thereby are effectively excluded from supplying the majority of the supermarket, or choice outlets, business in the Chicago Area.

22. Dean supplies the largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area. Bowman supplies the third or fourth largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area.

V

Violations Charged

23. On December 13, 1965, Dean and Bowman entered into an agreement. This agreement provides that Bowman sell to Dean all of its plants and equipment; accounts re-

ceivable; inventories; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; [fol. 16] "the benefit of all relationships with customers and suppliers"; all customer and supplier lists; and various other tangible and intangible assets. The physical transfer of these assets from Bowman to Dean is scheduled to take place on January 3, 1966.

24. The effect of Dean's acquisition of Bowman may be to lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is in unreasonable restraint of trade and commerce, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States, described in Paragraph 13, thereby tending to bring about the adverse competitive effects described in Paragraph 15;

[fol. 17] (f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk.

Wherefore, The Premises Considered, the Federal Trade Commission on this 22nd day of December, A.D., 1965, issues its complaint against said respondent.

[fol. 18] Notice

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of February A.D. 1966, at 10 o'clock is hereby fixed as the time and Federal Trade Commission offices, 1101 Building 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint, or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission

under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

[fol. 19] In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 22nd day of December — , A.D., 1965.

By the Commission.

[Seal.]

Joseph W. Shea, Secretary.

[fol. 20] EXHIBIT B

12/9/65

Purchase Agreement

This Purchase Agreement made on the 13th day of December, 1965, by and between Bowman Dairy Company, an Illinois corporation (hereinafter referred to as "Seller") and Dean Foods Company, an Illinois corporation (hereinafter referred to as "Buyer"), in consideration of the mutual promises herein contained and for other good and valuable considerations:

Witnesseth:

1. Seller agrees to sell and Buyer, in reliance on Seller's covenants, representations and warranties, agrees to buy on the Closing Date (as hereinafter defined) all of Seller's right, title and interest in and to the following assets (the "Assets"):

A. All accounts receivable.

B. All inventories.

C. All prepaid expenses.

D. All property, plant and equipment.

E. All non-current receivables.

F. All miscellaneous investments other than those excluded by subparagraph P iv of this paragraph 1.

G. All repair parts, supplies, etc.

H. All leases, leasehold interests and leasehold improvements.

I. The name, "Bowman", and all other trade-marks, trade names, patents and patent rights, copyrights and all other material and supplies used in connection with Seller's business and with the promotion and advertising of its products.

[fol. 21] J. The benefit of all relationships with suppliers and customers.

K. All purchase orders and sales orders.

L. All customer lists, supplier lists and catalogs.

M. All insurance policies (other than life insurance policies).

N. All other contracts.

O. All printed forms, office supplies, and other supplies and small tools.

P. All other tangible and intangible assets, rights, choses in action and all other things of value of Seller except that the following are expressly excluded from this sale:

i. Seller's cash on deposit and on hand;
ii. Seller's U. S. Government Securities;
iii. Seller's marketable securities;
iv. Seller's miscellaneous investments in

a. Stock in Lake Shore Realty Co., Milk Dealer Bottle Exchange, and Dairy House, having respective book values to Seller on June 30, 1965 of $5,400, $17,240 and $500;

b. Certificate of deposit with National Bank of North Evanston of $10,000; Savings accounts at Lincoln Way Savings and Loan Association of Lennox, Illinois ($10,000) and at Illinois Federal Savings and Loan Association of Chicago ($5,000).

[fol. 22] c. Installment sales contract with LaSalle National Bank of Chicago, as trustee, having a net book value to Seller on June 30, 1965 of $209,933.72;

v. Seller's claims for refund of income taxes paid or to be paid.

vi. Seller's life insurance policies on the lives of its present and retired administrative personnel, (including the cash surrender values of such policies) having a book value to Seller on December 31, 1964 of $912,943.

2. Except as adjusted as provided in paragraph 14 below, the agreed consideration to be received by seller from Buyer for the Assets shall be Twelve Million Dollars ($12,000,000) less the book value on the Audit Date of the Assets excluded by paragraph 1 P i-vi above, less any dividends or other distributions made or provided for with respect to the stock of Seller during the period July 1, 1965 through the Closing Date, and plus the book value (computed as set forth in paragraph 3) on the Audit Date of the Liabilities to be excluded pursuant to subparagraphs A, D, and F of paragraph 3 below. The agreed consideration shall be paid

by Buyer's certified (or bank) checks payable to Seller delivered as follows:

A. On the Closing Date, Four Million Dollars ($4,000,000).

B. On the Payment Date defined in paragraph 13 below, all but One Million Dollars (1$,000,000) of the balance of the agreed consideration for the Assets (as adjusted pursuant to paragraph 14).

C. On December 31, 1966, One Million Dollars ($1,000,000), plus interest thereon from the Payment Date defined in paragraph 13 below to December 31, 1966, computed at the rate of four and one-half per cent (4½%) per annum.

[fol. 23] In addition to the agreed consideration, Buyer on the Closing Date shall assume the liabilities (the "Liabilities") of Seller entered on its respective books and records, as of the Audit Date (as hereinafter defined), or incurred pursuant to contracts, purchase orders, sales orders or leases assigned to Buyer and either listed on Exhibit G or excepted by paragraph 6 K below from being listed on Exhibit G, except:

A. Those liabilities owed for any federal or state taxes on income, which for purposes of computing the agreed consideration shall be valued as provided on Exhibit N.

B. Those liabilities which, if when asserted against Buyer, would then be barred by the applicable statute of limitations if then asserted against Seller.

C. Those liabilities which are covered by insurance (other than life insurance) carried by Seller.

D. Those liabilities incident to workman's compensation claims by or on behalf of Seller's employees, which for purposes of computing the agreed consideration shall be valued as provided on Exhibit N.

E. Those liabilities incident to Seller's 1953 pension plan for salaried employees.

F. Those liabilities incident to retirement agreements with certain present and retired administrative personnel listed on Exhibit G, which for purposes of computing the agreed consideration shall be stated at $720,000.

4. Except as specifically provided in paragraph 3, it is expressly agreed that Buyer does not assume any other liability of Seller, and Seller covenants and agrees to assume and be responsible for any other liabilities that it may have incurred.

[fol. 24] 5. Two o'clock P. M., local time, on January 3, 1966, shall be the Closing Date referred to herein, such time to be of the essence hereof. The closing shall take place at the offices of Kirkland, Ellis, Hodson, Chaffetz & Masters, 2900 Prudential Plaza, Chicago, Illinois, or such other place as the parties may mutually select.

6. As material inducements to Buyer's entering into this Purchase Agreement, Seller makes the following representations, warranties and covenants, all of which shall, unless otherwise expressly stated, survive the Closing Date and any investigation made by or on behalf of Buyer at any time prior to December 31, 1966:

A. Seller:

i. is a corporation duly organized, validly existing and in good standing under the laws of the State of Illinois;

ii. has the power and authority to own and operate its properties as presently owned and operated and to conduct its business as presently conducted;

iii. is qualified and in good standing as a foreign corporation in the States of Wisconsin and Indiana;

iv. transacts no business in any jurisdiction other than those listed in subparagraphs i and ii above which requires Seller to be qualified as a foreign corporation;

v. has the following subsidiaries which are incorporated in and qualified as foreign corporations as set forth below:

[fol. 25]

Corporate Name	State in which incorporated	What other States qualified in
Badger Ice Cream Company (inactive)	Wisconsin	Illinois and Indiana
Bowman Dairy Company, Inc.	Indiana	Kentucky
Bowman Dairy Company	Ohio	none
Bowman Dairy Sales Company	Delaware	Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mary-

Corporate Name	State in which incorporated	What other States qualified in
		land, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin
The Carroll Company (inactive)	Illinois	none
The Cremix Company	Illinois	none
Cremix Frozen Products, Inc. (inactive)	Ohio	none
Deerfield Creamery Company	Wisconsin	none
Forest Milk Company	Illinois	Wisconsin
Frosty Products Distributors, Inc. (inactive)	Illinois	none
Frosty Products Distributors, Inc. (inactive)	Wisconsin	none
Iowana Farms Milk Company	Iowa	Illinois
Marwyn Dairy Products Corporation (inactive)	Illinois	Wisconsin
Parade Products, Inc.	Illinois	none
Progressive Dairy Products Company	Wisconsin	none
Ranney's Dairy, Inc.	Wisconsin	none
Ridgeview Farms Dairy, Inc. (inactive)	Illinois	none
H. J. Schults, Inc. (inactive)	Illinois	none

[fol. 26]

Sealrich Dairy Company	Michigan	none
Sunnybrook Farms Milk Company (inactive)	Illinois	none

vi. owns all of the outstanding capital stock of each of such subsidiaries free and clear of all liens and such shares are validly issued, fully paid and non-assessable;

vii. as of the Audit Date, covenants that all of the assets (other than of the type excluded pursuant to paragraph 1 P i-vi above) and liabilities (other than of the type excluded pursuant to paragraph 3 A-F above) of each subsidiary will be transferred to and assumed by Seller.

B. Seller is authorized to issue 200,000 shares, all of which are shares of common stock $50 par value per share, and on the date hereof 164,800 of such shares have been issued of which 11,400 are held in its treasury. All of Seller's issued shares are validly issued, fully paid and non-assessable; there are no commitments, options or other rights for the purchase or other acquisition of any of the Seller's unissued or treasury

shares; and there are no agreements that now or in the future may require Seller to repurchase any of its shares.

C. Seller's audited consolidated balance sheet as of December 31, 1964 and unaudited consolidated balance sheet as of June 30, 1965, attached hereto as Exhibit A and its statement of operations for the six months ended June 30, 1965, attached hereto as Exhibit B:

[fol. 27] i. are in accordance with Seller's books and records;

ii. are correct and complete and present fairly the financial condition and results of operations of the Seller as of the dates and for the period indicated; and

iii. have been prepared in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods involved.

Seller's financial statements after audit will show a consolidated net worth of Seller on the Audit Date of no less than $14,000,000 and that the Assets being purchased hereunder will exceed the Liabilities being assumed by at least $10,000,000 on the Audit Date.

D. Except to the extent reflected in said Exhibit A and except to the extent incurred pursuant to contracts listed on Exhibit G or excepted by paragraph 6 K below from being listed on Exhibit G, Seller had no obligations or liabilities, contingent or otherwise, as of June 30, 1965, or any other liability arising out of activities engaged in, or facts existing prior thereto.

E. Except as stated in Exhibit C, since June 30, 1965, no change has occurred in the assets, liabilities (contingent or otherwise), business (other than in the ordinary course of good business practice), employee relations or operations of Seller other than changes in aggregate not materially adverse, and since such date [fol. 28] Seller has not, nor will it, without Buyer's prior written approval from the date hereof to the Closing Date have:

i. declared or paid any dividend or other distribution in respect of its capital stock or acquired any of its stock in excess of $500,000 in the aggregate;

ii. authorized or paid any bonus or increased the

compensation of any officer or employee of the Seller;

iii. authorized or made any contribution to Seller's 1953 pension plan for salaried employees;

iv. waived any rights of substantial value;

v. made any capital expenditure or any commitments therefor in excess of $550,000 in the aggregate;

vi. entered into any employment contract or agreement which is not terminable upon thirty days notice by it;

vii. made any change in its Articles of Incorporation or its issued stock or merged with, consolidated with or acquired any other business entities (other than required by paragraph 6 A vii);

viii. pledged or otherwise have encumbered any of its assets or properties;

[fol. 29] ix. entered into any transaction other than in the ordinary course of business.

F. The Accounts Receivable and Notes Receivable of Seller shown on Exhibit A (or thereafter acquired before the Audit Date) are valid and subsisting accounts or notes of Seller, correct as to amount and legally enforceable according to their terms with no right of set off against them. Nothing herein contained shall be construed as a guarantee of collectibility of any such accounts receivable.

G. The inventories of Seller shown on Exhibit A (or thereafter acquired prior to the Audit Date) consist of items of a quality and quantity usable or salable in the normal course of business of Seller, and the values at which the inventories are carried reflect Seller's normal inventory valuation policy of stating the inventory at cost or market, whichever is lower.

H. Attached hereto as Exhibit D is a list and brief description of all parcels of real property owned by Seller or any subsidiary. Seller or one of its subsidiaries as specified in Exhibit D has good and marketable title in fee simple to each said parcel, and owns outright all the assets and property, real and personal to be transferred to Buyer as provided herein. Each said parcel is:

i. free and clear of all liens, charges and encumbrances (including, without limitations, mortgages,

[fol. 30] mechanics' liens, and liens for Federal, State, County, Town or School Taxes or Assessments not delinquent) except liens, if any, of current local taxes or assessments not delinquent, or being contested in good faith in appropriate proceedings and for which the Seller has established adequate reserves for the payment thereof; and

ii. insurable (as evidenced by a preliminary title report of a title company acceptable to Buyer dated not earlier than 30 days prior to the Closing Date) by a policy of title insurance in an amount at least equal to Seller's December 31, 1964 book value of the land (excluding building) contained in such parcel, containing no more than the following permitted exceptions:

a. standard exceptions and

b. exceptions for minor imperfections in title that are not substantial and do not materially detract from the value of the property or materially impair the use thereof or interfere with the customary operations of the business in which said property is used.

I. Except as provided in Exhibit E, all personal property to be transferred to Buyer as provided herein is free and clear of all security interests and other encumbrances. There are no pending violations with respect to the plants, structures, machinery and equipment and all other items to be transferred to Buyer as provided herein, and subject only to ordinary wear and tear all [fol. 31] plants and other buildings will be in the same condition on the Closing Date as on the date hereof. Except as provided in Exhibit E, all of the personal property to be transferred to Buyer as provided herein will be located on the Closing Date in or on the real estate described in Exhibit D and all personal property located in or on the real estate described in Exhibit D on the Closing Date will be the property of Seller.

J. Attached hereto as Exhibit F is a list and brief description of all domestic and foreign patents, patent applications, patent rights, inventions or discoveries as to which no application for patent has been filed, trademarks and trade names, as well as registrations therefor,

and copyrights presently owned by Seller which (together with the agreements listed in Exhibit G) are sufficient to permit Seller to conduct its business as now operated; all of said items are owned solely by Seller as specified in Exhibit F, are valid and in good standing, and are not subject to any outstanding licenses, liens or other encumbrances; and none of the Seller's shareholders, directors, officers or employees has any interest in any of the aforementioned kinds of items except as disclosed in Exhibit F.

K. Attached hereto as Exhibit G is a list and brief description of all written or oral leases and other agreements (including licenses pertaining to patents, trademarks and tradenames, copyrights, formulae and recipes) to which the Seller is a party, except that Exhibit G need not list agreements made in the ordinary course of [fol. 32] Seller's business that either involve less than $5,000 or may be terminated by either party on not more than 30 days notice. All such leases and agreements either are freely assignable by Seller or Seller will obtain the necessary consents to transfer the same to Buyer on the Closing Date. Seller has complied with all the provisions of said leases and agreements and is not in default under any of them, except as stated in Exhibit G. None of said leases and agreements, and no provision of Seller's Articles of Incorporation or By-Laws, materially and adversely affects the business or financial condition of Seller. True and complete copies of all of said leases and agreements have been delivered to Buyer and there have been no modifications or amendments in any of them.

L. Attached hereto as Exhibit H is a list of all policies of fire, liability, life and other forms of insurance carried by Seller and the nature and amount of coverage in each case. All such policies are in force now and will be in force on the Closing Date. All expiring policies have been or will be renewed for periods expiring on June 30, 1966, unless Buyer otherwise consents in writing.

M. Attached hereto as Exhibit I is a list showing the names of all persons receiving compensation from Seller as of the date hereof in excess of $10,000 per annum and the amounts of their compensation, except such persons

as may be paid pursuant to a collective bargaining agreement listed on Exhibit K.

[fol. 33] N. Attached hereto as Exhibit J is a brief description of all profit sharing, stock option, stock purchase, bonus, pension, retirement, group insurance and other employee welfare plans, written or oral, relating to employees of Seller. Except as stated on Exhibit G Seller is not now and on the Closing Date will not be a party to any employment contract with any officer, director, employee or agent.

O. Exhibit K attached hereto lists all of the unions that now are certified or claiming to be certified as collective bargaining agent to represent employees of Seller and also lists and describes all of the Seller's labor disputes and grievances proceedings before the National Labor Relations Board or any other governmental agency or commission which are now pending.

P. On the Closing Date Seller will be in compliance with all requirements of law except the Bulk Transfer Provisions of the Illinois Commercial Code and the comparable provisions of the laws of other states.

Q. There is no litigation, proceeding, investigation or claim pending or threatened against, by or affecting Seller which could materially affect its business or financial condition, except as listed in Exhibit L. The Seller is not a party to any order, decree or ruling of any court or administrative agency, federal, state or local, and has not had any contacts, formal or informal, with any such [fol. 34] agency that could materially affect its business or financial condition, except as listed in Exhibit L. There is no pending or threatened dispute between Seller and any of its employees that could materially and adversely affect its organization or operations. Seller has complied in all material respects with applicable laws, regulations and orders applicable to its business. There is not now any notice of any kind from any governmental authority or insurance or inspection body relating to or requiring any work to be done by Seller or prohibiting it from carrying on its business as now conducted.

R. The execution and performance of this Purchase Agreement by Seller has been duly authorized by its Board of Directors subject to approval of its Shareholders, and will not violate its Articles of Incorporation,

By-Laws, or any agreement to which it is a party. Simultaneously with the exception of this Purchase Agreement the holders of at least two-thirds of Seller's outstanding stock have executed and delivered to Buyer their irrevocable proxies (in the form attached hereto as Exhibit M) to vote in favor of the consummation of this transaction at a special meeting of the Shareholders of Seller to be held on or before the Closing Date. On or before December 22, 1965, Seller shall give notice of a special Shareholders' Meeting as required by law unless prior to that date Buyer has exercised its privilege of cancelling this Purchase Agreement pursuant to paragraph 8 below. On or prior to the Closing Date, Seller by appropriate [fol. 35] corporate action, duly taken, will have authorized a change of its corporate name to "Bowfund Corporation" and will execute consents evidencing Buyer's unrestricted right to use the corporate name "Bowman Dairy Company".

S. The federal income tax returns of Seller have been examined by the Internal Revenue Service for all years through December 31, 1963, and have been closed through that year. The results of such examinations are properly reflected in the financial statements referred to above.

T. Seller has filed all reports and returns required by any law or regulation to be filed, and has duly paid all taxes, duties and charges due on the basis of such returns and reports, and the assessment of any material amount of additional taxes in excess of those paid and reported is not reasonably expected. Seller now has all required licenses, permits, certificates, and authorizations needed for the conduct of the Seller's business in all states and jurisdictions where the Seller engages in business and all said licenses, permits, certificates and authorizations are fully paid or provided for and in good standing.

U. The books of account of the Seller adequately reflect all items of income and expense, and all assets, liabilities and accruals.

V. No agent or broker or other person acting pursuant to the authority of Seller or any of its directors or officers is entitled to any commission or finder's fee in connection with the transactions contemplated by this [fol. 36] Purchase Agreement.

W. The representations and warranties of Seller con-

tained in this Purchase Agreement shall be true in all material respects on and as of the Closing Date to the same extent as though they were made on and as of that date, except as affected by transactions contemplated herein.

7. After the date hereof and until the Closing Date, representatives of Buyer and persons designated by Buyer shall have reasonable access to the offices, plants, warehouses, books of account, records, minute books, instruments, documents, correspondence, evidence of title and other assets and properties of Seller, and the officers and employees of Seller shall be required to confer with such representatives and persons as reasonably requested by Buyer from time to time. Should the closing under this Purchase Agreement not be held for any reason, Buyer agrees not to use or disclose to third parties without Seller's consent any information acquired by Buyer in the exercise of its rights under this paragraph.

8. Notwithstanding the other provisions of this Purchase Agreement, on or before the Closing Date, Buyer shall have the right to cancel this Purchase Agreement without penalty if on or before that date a complaint seeking an injunction, preliminary injunction or temporary restraining order has been filed (and which has not been dismissed prior to the Closing Date) by any governmental agency, commission, or department on the basis that the consummation of the transactions contemplated by this Purchase Agreement violates any state or federal law. If Buyer cancels this Purchase Agreement pursuant to the provisions of this paragraph 8, Buyer shall return to Seller any and all irrevocable proxies delivered pursuant to paragraph 6 R and neither party shall have any obligation to close the transactions contemplated hereby.

[fol. 37] 9. The following shall be conditions precedent to Buyer's obligation to close hereunder:

A. Each of the representations and warranties set out in this Purchase Agreement shall be true and correct at all times hereafter to and including the Closing Date.

B. Each of the covenants and undertakings of Seller contained in this Purchase Agreement will have been

fully performed and complied with on or before the Closing Date.

C. At a meeting of the Shareholders of Seller held on or prior to the Closing Date the consummation of transactions contemplated by this Purchase Agreement shall have been duly authorized.

D. There shall have been delivered to Buyer on or before the Closing Date all documents required to be delivered by paragraph 10.

Buyer in writing may waive compliance with any or all of the aforementioned conditions precedent to its duty to close hereunder.

10. On the Closing Date Seller shall deliver to Buyer:

A. Bills of sale, certificates of title, and other documents of conveyance and instruments of assignment and transfer in form and substance reasonably satisfactory to counsel for Buyer with respect to all of the Assets being purchased hereunder together with all necessary consents to the conveyances, transfers, and assignments of such Assets and to the assumption of the Liabilities assumed hereunder.

B. All books of accounts, records, correspondence, and other papers and documents of Seller as Buyer may [fol. 38] reasonably require by reason of the acquisition of the Assets sold hereunder, provided that Seller shall have reasonable access thereto for the purpose of inspection and copying and making such other use thereof as Seller may reasonably require in such manner as not to interfere with the reasonable business needs of Buyer.

C. All permits, licenses, certificates and other authorizations required by any public authority which Seller now has and which are legally transferable.

D. Certified copies of resolutions approving and authorizing the execution and performance of this Purchase Agreement by Seller, duly adopted by the Board of Directors and Shareholders of Seller in form and substance satisfactory to counsel for Buyer.

E. Duplicate executed copies of an Amendment to the Articles of Incorporation of Seller changing its corporate name in accordance with this Purchase Agreement, and executed consents evidencing Buyer's unrestricted

right to use the corporate name "Bowman Dairy Company".

F. The favorable opinion of Messrs. Rothschild, Hart, Stevens & Barry, counsel for Seller, in form and substance satisfactory to counsel for Buyer and dated the Closing Date to the effect that:

i. this Purchase Agreement has been duly and validly authorized, executed and delivered by Seller and is valid and binding upon Seller and is enforceable in accordance with its terms;

[fol. 39] ii. the execution and delivery of the documents referred to in paragraph 10 A above for the consummation of this Purchase Agreement have been duly authorized by Seller, have been executed and delivered on behalf of Seller by a duly authorized officer or officers, and are sufficient to vest in Buyer all of the Assets to be purchased hereunder;

iii. the execution and performance of this Purchase Agreement does not conflict with any of the provisions of Seller's Articles of Incorporation or By-Laws or to the best of such counsel's knowledge any agreement, instrument, or court order which is binding upon Seller or to which it is subject;

iv. except as stated in Exhibit L, to the best of such counsel's knowledge and belief, after reasonable inquiry, there is no pending or threatened litigation, proceeding or investigation against Seller which could result in any materially adverse change in the properties, its business or financial condition or prospects or which questions the validity or propriety of this Purchase Agreement or any action or to be taken pursuant hereto;

v. to the best of such counsel's knowledge and belief Seller has performed and complied with all agreements and conditions required hereunder to be performed or complied with by it on or prior to the Closing Date.

[fol. 40] G. The certificate of the President of Seller dated the Closing Date, that the representations and warranties of Seller contained in this Purchase Agreement are true in all material respects on and as of the Closing Date to the same extent as though they were

made on and as of the Closing Date, except as affected by transactions contemplated herein.

H. Such other or additional instruments, consents, opinions, endorsements and documents as counsel for Buyer may reasonably consider necessary to consummate the transactions contemplated by this Purchase Agreement.

I. Executed escrow agreement in the form attached hereto as Exhibit O.

11. On the Closing Date if all of the conditions specified in paragraph 9 above are either performed by Seller or waived by Buyer, Buyer shall pay to Seller the amount specified in paragraph 2 A, shall execute the Escrow Agreement (Exhibit O) and shall deliver to Seller:

A. Instruments in form and substance reasonably satisfactory to counsel for Seller evidencing Buyer's assumption of the Liabilities to be assumed hereunder.

B. Certified copies of the resolutions of Buyer's Board of Directors authorizing the execution and delivery of this Purchase Agreement and the consummation of the transactions contemplated hereby.

C. The favorable opinion of Kirkland, Ellis, Hodson, Chaffetz & Masters, counsel for Buyer, in form and substance satisfactory to counsel for Seller and dated the Closing Date to the effect that:

i. this Purchase Agreement has been duly and validly authorized, executed and delivered by Buyer, is valid and binding upon Buyer and is enforceable in accordance with its terms;

ii. the execution and delivery of the instruments evidencing the assumption of the Liabilities to be assumed hereunder have been duly authorized by Buyer, have been executed and delivered on behalf of Buyer by a duly authorized officer and are sufficient to bind Buyer to pay the Liabilities assumed.

12. As soon as practicable after the Closing Date an audit of Seller's financial statements as of the close of business December 31, 1965 (the "Audit Date"), shall be made by Arthur Andersen & Co. Such audit shall be made in ac-

cordance with generally accepted auditing standards and shall be at the expense of Seller. Upon completion of such audit, Seller shall deliver to Buyer a copy of the audited consolidated financial statements of Seller together with the opinion thereon of Arthur Andersen & Co. (the "Audit Report"), which financial statements shall be prepared in accordance with generally accepted accounting principles. The Audit Report shall also contain exhibits which reflect the following:

A. A consolidated balance sheet of Seller on the Audit Date prepared in accordance with Exhibit N attached hereto, (the "Adjusted Balance Sheet").

D. The amount of Seller's net worth shown on the Adjusted Balance Sheet before any payment or provision for dividends or other distributions with respect to the stock of Seller from July 1, 1965 through the Audit date.

C. The computation of the agreed consideration for the Assets purchased hereunder as adjusted pursuant to paragraph 14.

[fol. 42] 13. The Audit Report referred to in paragraph 12 shall be binding and conclusive upon the parties hereto in determining the amounts referred to in paragraph 12 A, B, and C unless within ten business days after receipt by Buyer of the Audit Report, Buyer notifies Seller that Buyer is in disagreement with the Audit Report, in which event Buyer and Seller each within three business days thereafter shall appoint an arbitrator and said arbitrators within five business days thereafter shall appoint a third arbitrator who shall act as chairman of a board of arbitrators. Within ten days after the appointment of the third arbitrator, the arbitrators (by majority action) shall decide in what respects, if any, the amounts referred to in subparagraphs A, B, and C of paragraph 12 shall be changed from those indicated in the Audit Report, and shall deliver a signed copy of their decision to Buyer and Seller. Said decision of a majority of the arbitrators shall be in writing and shall be binding and conclusive on the parties hereto in determining the amounts referred to in paragraph 12 A, B, and C. Each of the parties hereto shall pay all expenses of the arbitrator selected by such party and the parties hereto each shall pay one half of the expense of the third arbitrator. In the event that Buyer does not indicate disagreement with the Audit

Report, as herein provided, the Payment Date referred to in paragraph 2 C shall be the thirteenth business day after receipt of the Audit Report, as provided herein; and in the event Buyer does indicate disagreement with such Audit Report as provided herein, the Payment Date referred to in paragraph 2 C shall be the third business day after the decision of the majority of the arbitrators is delivered. During the course of the audit referred to in paragraph 12, representatives of Buyer shall have complete access to the books of account and all other records of Seller and the auditing working papers of Arthur Andersen [fol. 43] & Co., prepared in connection with their examination of the financial statements of Seller and its subsidiaries for the years ending December 31, 1964 and 1965.

14. To the extent that the Audit Report (or the decision of the arbitrators as the case may be) indicates that the amount referred to in paragraph 12 B is less than $17,778,468, the agreed consideration for the Assets will be reduced by the amount of that deficit and to the extent that it is so indicated that the amount referred to in paragraph 12 B exceeds $19,058,468, the agreed consideration for the Assets will be increased by the amount of that excess. To the extent that the Audit Report (or the decision of the arbitrators as the case may be) indicates that the amount referred to in paragraph 12 B is between $17,778,468 and $19,058,468 no adjustment to the agreed consideration for the Assets shall be made.

15. Seller agrees to indemnify and hold Buyer, its successors and assigns harmless from and against and in respect of:

A. Any and all loss, damage or liability which Buyer may be required to pay or become liable for arising out of any obligation or liability of Seller not assumed by Buyer hereunder.

B. Any and all loss, damage and deficiency resulting from any misrepresentation, breach of warranty or nonfulfillment of any warranty, representation, covenant or agreement on the part of Seller contained herein, or in any agreement, assignment, document, statement or certificate furnished or to be furnished to buyer pursuant to or in connection with the transactions contemplated hereby.

[fol. 44] C. Any and all loss, damage or liability to which Buyer or the Assets sold hereunder may be subjected by reason of failure to comply with the Bulk Transfer provisions of the Commercial Code of any state or the provisions of any act requiring notice of the transactions contemplated hereby to any governmental authority or agency.

D. Any and all claims, liabilities, obligations, losses, damages, actions, suits, proceedings, demands, assessments, judgments, reasonable counsel fees, costs and expenses incident to any of the foregoing.

16. After the Closing Date, if any claim be made to, or suit brought against, Buyer for injury, loss, damage, compensation, for any other right, demand or claim whatsoever, for which Seller may be held liable to the claimant, or to Buyer under any indemnity, Buyer shall promptly notify Seller and Seller shall furnish defense. Buyer shall make no settlement or give any consent affecting Seller without Seller's written consent, unless Seller has theretofor failed to accept such defense within five days after Buyer has notified Seller of such claim or suit. Buyer agrees to indemnify and hold Seller, its successors and assigns harmless from and against and in respect of any Liability assumed by Buyer hereunder.

17. If for any reason all of the conditions specified in paragraph 9 shall not be fulfilled or waived by Buyer, Buyer in addition to other remedies available to it at its option, either:

A. May rescind this Purchase Agreement in which event no party shall thereafter have any liability or obligation hereunder; or

[fol. 45] B. Due to the unique character of Seller's Assets to be purchased, by suit may enforce the specific performance of this Purchase Agreement without prejudice to Buyer's rights to damages pursuant to paragraph 14.

18. By notice to Seller delivered on or prior to the Closing Date Buyer may:

A. Adopt the 1953 Pension Plan for Salaried Employees of Bowman Dairy Company (the "Plan"), in

which event Seller shall make such amendments as Buyer shall require in order that Buyer shall thereafter be entitled to exercise all rights and powers reserved to Seller under the Plan, and the trust implementing the Plan; or

B. Require Seller to give notice to the Trustees of the Plan that Buyer during the year 1966 will require the transfer of trust funds held with respect to participants formerly employed by Seller and thereafter employed by Buyer ("Transferred Participants") to the trustee of a separate trust, in which event Seller shall direct the trustees to segregate from the trust fund and transfer to such separate trust such portion of the trust fund as may thereafter be determined by Buyer to constitute the share of the trust fund held in respect of Transferred Participants. The portion of the trust fund subject to transfer shall be an amount equal to the proportion of the trust fund which the actuarial liability of Transferred [fol. 46] Participants bears to the total acturial liability of all participants entitled to benefits under the Plan and in making such determination Buyer shall be entitled to rely on the advice of its actuary or actuaries. During the pendency of the transfer of trust funds no distributions shall be made to any participants on account of a termination of employment except that distributions may be made to participants already retired and to participants who attain their normal retirement age during such period.

Seller agrees not to amend, terminate, make a contribution to, or take any other action with respect to the Plan or the trust prior to the Closing Date without the prior consent of Buyer.

19. After the Closing Date, Seller, as and when requested by Buyer, will execute, acknowledge and deliver any and all additional instruments of transfer and assignment and take such further action as Buyer may reasonably request for the more effective transferring and assignment to Buyer of the Assets purchased hereunder and the consummation of all other transactions contemplated by this Purchase Agreement. After the Closing Date Seller will comply with all reasonable requests of Buyer to cooperate with Buyer in any controversy with third persons with respect to any of the Assets purchased or Liabilities assumed hereunder.

20. Notices, requests, demands, certificates, and other communications hereunder, before or after the Closing Date

shall be in writing and shall be deemed to have been duly received or made if mailed by United States Registered or [fol. 47] or Certified Mail, Postage Prepaid, Return Receipt Requested, addressed:

If to Buyer:	Kenneth J. Douglas 3600 River Road Franklin Park, Illinois
If to Seller:	Thomas J. Kullman 201 N. Wells Street Chicago, Illinois

or, if delivered in person to Kenneth J. Douglas, on behalf of Buyer, and to Thomas J. Kullman, on behalf of Seller, or to such other person or such other address as any party may hereafter designate by written notice to the other.

21. This Purchase Agreement shall be binding upon the parties hereto and their respective successors and assigns and the benefits hereunder shall inure to the same. By notice to Seller delivered at least five days before the Closing Date, Buyer may elect to transfer all or certain of its rights, powers or obligations under this Purchase Agreement to any corporation or corporations controlled by Buyer. In the event of any such transfer, Buyer shall remain liable for the full performance of all obligations of Buyer hereunder.

22. Each party to this Purchase Agreement shall pay all of its own expenses incurred in connection with this Purchase Agreement including any expenses incurred in connection with the negotiation and preparation of this Purchase Agreement and the transactions contemplated hereby.

23. This Purchase Agreement supersedes all prior understandings and represents the entire agreement between the parties hereto and there are no collateral or oral agreements or understandings. All additions, variations or modifications to this Purchase Agreement shall be void and ineffective unless in writing, signed by the parties. All exhibits referred to herein are attached hereto and made a part hereof.

[fol. 48] 24. This Purchase Agreement is being delivered and is intended to be performed in the State of Illinois and shall be governed and construed in all respects in accordance with the laws of such state.

In Witness Whereof, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

Bowman Dairy Company, By /s/ T. J. Kullman as its President.

Attest:

/s/Gordon Adamson as its Secretary.

Dean Foods Company, By /s/ Howard M. Dean as its President.

Attest:

/s/ Kenneth J. Douglas as its Secretary.

[fol. 49] EXHIBIT C

AFFIDAVIT OF SCOTT A. WALKER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is Scott A. Walker. I am an economist in the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C. 20580.

I have been an economist or an economic consultant with the Federal Trade Commission since September, 1961. During this time, it has been my job to analyze the probable competitive effects of acquisitions and mergers and to assist in the preparation of economic data for introduction into evidence in merger cases arising under Section 7 of the Clayton Act. I have personally participated extensively in the preparation for trial of various Federal Trade Commission dairy merger cases including *Beatrice Foods Co.*, Docket 6653; *The Borden Company*, Docket 6652; and *National Dairy Products Corp.*, Docket 6651.

Prior to my coming to the Federal Trade Commission, I was closely associated with the dairy industry for almost 25 years. From 1937 to 1939 I worked as a deliveryman and plant relief employee for Sidwell Dairy Company in Iowa City, Iowa. Between 1939 and 1941, I operated a farm in which dairy production was the major source of [fol. 50] income. During 1941 I operated a retail milk route for Sanitary Dairy in Cedar Rapids, Iowa. Between January 1946 and June 1949, I attended Iowa State University, receiving both my bachelor and master degrees in economics. My master's thesis was on the subject of cost allocation in multiproduct dairy processing plants. In June 1948 I accepted a position as organizer and manager of a milk producer's bargaining association in Boone, Iowa, for six months.

In July 1950 I became a cooperative agent with the United States Department of Agriculture and the University of Idaho for the Western Regional Dairy Marketing Committee; in this capacity I supervised several studies of dairy plant economies of scale. From 1953 to September 1961, I was an assistant and associate professor in the Agricultural Economics Department of the University of

Idaho; my chief responsibility was as dairy marketing specialist for the University. As a result of research conducted with the Western Regional Dairy Marketing Committee and the University of Idaho during this time, I was senior author or joint author of five publications and two journal articles relating to the production of milk and the marketing of dairy products.

During July of 1963 I was assigned, by request of the Department of Justice, to serve as a special consultant to [fol. 51] the Antitrust Division of that Department in a Sherman Act, milk price-fixing case against National Dairy Products Corporation before the United States District Court for the Western District of Missouri (Cr. No. 17,734).

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company by Dean Foods Company and other available information concerning the dairy industry and have reached the conclusion that this acquisition will lessen competition substantially and tend to create a monopoly in the sale and distribution of packaged milk in the Chicago, Illinois, area:

1. Through its acquisition of Bowman, Dean, a major factor in the packaged milk business in the Chicago Federal Milk Marketing Order ("FMMO") Area, will eliminate its largest single competitor. Bowman is either the largest or the second largest seller of packaged milk in the Chicago FMMO Area with approximately 16% of total sales; Dean is either the third or fourth ranking seller with about 7% of total sales. The combined sales of the two companies amount to some 23% of the market.

2. The Bowman acquisition by Dean will result in a significant increase in the level of concentration in the packaged milk business in the Chicago FMMO Area and will accordingly increase the probability of the leading sellers' refraining from vigorous competition. The four [fol. 52] largest sellers of packaged milk in this market presently enjoy about 42% of total sales; as a result of the acquisition the three leading sellers will command about 42% (Dean, The Borden Company and Hawthorne-Mellody). The remaining approximately 58% is divided among dozens of smaller firms. Furthermore, recent events indicate that there exists a distinct trend toward concentration and oligopoly in this market. Within the past few months at least four packaged milk firms have

gone out of business in the Chicago FMMO Area—two by acquisition. Bowman, itself, very recently acquired a Chicago packaged milk distributor which Bowman had been supplying since that firm ceased processing about two years ago. The acquisition of Bowman, eliminating as it does a leading seller of packaged milk in the Chicago FMMO Area, moves the market a significant step closer to a state of oligopoly, and thus will involve substantial lessening of competition and tendency to monopoly.

3. The proper product market or line of commerce in which to evaluate the probable effects of this acquisition is, I believe, packaged milk (fluid milk in bottles or cardboard cartons) and closely related products such as skim milk, cream, etc. This product group is classified by the United States Bureau of Census as Standard Industrial Classification (SIC) Product Code 20262. Both Dean and Bowman are extensively engaged in the processing and sale of packaged milk and related products in the Chicago, Illinois, area.

[fol. 53] 4. I believe that the Chicago FMMO Area is a proper geographic market or section of the country in which to measure the effects of Dean's acquisition of Bowman. This area consists of the Counties of Cook, DuPage, Lake, Kane, and Will in the State of Illinois and the County of Lake in the State of Indiana. The most important characteristic of the Chicago and other FMMO Areas is that the price paid by packaged milk processors to the producer or farmer for fresh whole milk is regulated by the United States Department of Agriculture. Thus regulation has the effect of creating a relatively insulated market for processed packaged milk within the FMMO Area. Dean and Bowman are both engaged extensively in the processing and sale of packaged milk in the Chicago FMMO Area. In fact, the Chicago FMMO Area is Bowman's principal market; more than half of Bowman's total sales are made in the Chicago FMMO Area.

Scott A. Walker.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, '65.

Rita R. Votel, Notary Public, District of Columbia.

My commission expires on November 14, 1969.

[fol. 54] EXHIBIT D

AFFIDAVIT OF HARRY BENDER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is Harry Bender. I am Chief of the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address is 6th and Pennsylvania Avenue, N.W., Washington, D. C.

Between 1947 and 1961, I was employed as an economist in the Antitrust Division of the Department of Justice, where I had primary responsibility for the economic work in a number of major antitrust cases, several of which were in the merger field involving Section 7 of the Clayton Act. In this work, I gained considerable knowledge and experience in problems of divestiture.

I became Chief of the Division of Economic Evidence of the Bureau of Economics in October 1961. As Chief of this Division, I supervise the work of about sixteen economists, the majority of whom work on merger cases. Problems of divestiture arise in many of these merger cases. I review the staff's work on such divestiture matters, and I also participate personally in numerous negotiations and studies of various divestiture proposals.

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company [fol. 55] by Dean Foods Company, and I have come to the conclusion that, if the acquisition is consummated as planned, it will be extremely difficult, and very probably impossible to restore Bowman as a viable and effective independent processor and seller of packaged milk:

1. It has been my experience that effective divestiture relief in merger cases is always difficult. It is usually extremely difficult to locate satisfactory purchasers. This is because the most likely prospects for the purchase of a company acquired in violation of Section 7 are often its competitors, suppliers, or customers, and divestiture to such purchasers will often be as objectionable as was the original acquisition. During the course of litigation, the acquiring company frequently makes substantial changes

in the assets and operating methods of the acquired firm which complicate or even prevent effective divestiture. It has been my experience that there are very few litigated Federal Trade Commission merger cases which truly ended in the restoration of the acquired firm as a viable independent competitor in the market.

2. During the past three years, the Federal Trade Commission has entered four antimerger orders against dairy companies—*National Dairy Products Corp.*, Docket 6651; *The Borden Company*, Docket 6652; *Foremost Dairies, Inc.*, Docket 6495, and *Beatrice Foods Co.*, Docket 6653; the first three of these orders have already become final. To date, [fol. 56] the Commission and the respondents involved have engaged in extensive discussion and negotiation concerning divestiture of the acquired properties.

The working out of satisfactory divestiture arrangements has been extremely difficult and the results achieved have been, unfortunately, far short of the remedial action which would fully serve the public interest. For example, in many localities milk processing and distribution operations were consolidated, and acquired plants and routes were subsequently abandoned or otherwise disposed of; trademarks and trade names have been allowed to fall into disuse or even abandoned. The effect of this has been, in many sections of the country, to make it impossible to divest the acquired companies—because they no longer exist and cannot be reconstituted.

3. In the present case, Dean has indicated to the staff of the Federal Trade Commission that, shortly after the acquisition of Bowman, Dean will dispose of Bowman's retail home delivery routes, and that it will consolidate the operations of the two companies and close various Bowman plants. The contract between Dean and Bowman further provides that more than 25% of Bowman's total assets (principally cash and marketable securities), are to be retained by the Bowman stockholders; Dean is to acquire primarily fixed assets, accounts receivable, and good will. In short, approximately half of Bowman's present assets [fol. 57] will be disposed of after the acquisition takes place. When all of these events have taken place, restoration of Bowman as a viable independent company will be

virtually impossible, even though the acquisition be subsequently adjudged unlawful.

Harry Bender.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, 1965.

Anna Lee Strang.

My commission expires on June 14, 1968.

[fol. 58] EXHIBIT E

AFFIDAVIT OF MELBOURNE C. STEELE

City of Washington,
District of Columbia, ss:

My name is Melbourne C. Steele. I am the Chief of the Division of Accounting, Bureau of Restraint of Trade, Federal Trade Commission. My business address, and that of the Federal Trade Commission is Washington, D. C. 20580.

I have been an accountant with the Federal Trade Commission for 36 years. I have held my present position since 1963. In both capacities I have analyzed the financial statements of hundreds of industrial corporations.

I have examined the files of the Federal Trade Commission respecting the acquisition of Bowman Dairy Company by Dean Foods Company, including certain of Bowman's financial statements. These statements included consolidated income statements for the five years ending December 31, 1964, and a consolidated balance sheet as of December 31, 1964. Bowman's balance sheets for the years 1960-1963 were not available. On the basis of my examination of these data, I have concluded that Bowman was, on December 31, 1964, in sound financial condition:

1. Bowman reported a net income before federal income taxes in each of the last five years. In 1961 and 1964 Bow-
[fol. 59] man showed a net operating loss, but these losses were more than offset by other income. The operating loss in 1964, however, was largely offset by a non-recurring profit from the sale of fixed property.

2. While Bowman's net sales have declined from about $86.4 million in 1960 to about $77.6 million in 1964, substantial reductions have been made in the cost of sales and in delivery, selling and administrative expenses which largely offset the decline.

3. The Commission's files indicate that Dean plans to dispose of certain of Bowman's assets and business after the acquisition. While many of the properties Dean plans to sell are profitable, it will also dispose of Bowman's unprofitable retail and mixed routes in Chicago and its unprofitable ice cream plant and business in Cleveland. Dean has prepared a pro forma consolidated statement of income

for 1964, which segregates these unprofitable aspects of Bowman's business and which indicates that Bowman showed a small net operating profit on the remainder of its business.

4. As of December 31, 1964, Bowman showed a very substantial earned surplus amounting to approximately $10.8 million. The amount of earned surplus exceeds the sum of Bowman's capital stock ($8.2 million) and its long term debt ($1.5 million). This indicates that Bowman has largely financed expansion through reinvestment of its earnings.

[fol. 60] 5. Bowman's ratio of current assets to current liabilities (working capital ratio) in 1964 was 2.41 to 1, as compared with Dean's ratio of only 1.75 to 1. This ratio is a good indicator of the financial stability of Bowman.

/s/ Melbourne C. Steele.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 28th day of December, 1965.

Rita R. Votel, Notary Public, District of Columbia.

My commission expires on November 14, 1969.

[fol. 61] EXHIBIT F

AFFADAVIT OF HENRY A. SOLDWEDEL

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, ss:

My name is Henry A. Soldwedel. I am the President and Chief Executive Officer of Sidney Wanzer & Sons, Inc., a dairy company which operates in the Chicago, Illinois, metropolitan area. My business address, and that of my company, is 130 West Garfield Boulevard, Chicago, Illinois 60609.

I have been in the milk business for 40 years. Between 1925 and 1955 my, brother and I owned and operated a dairy company in Pekin, Illinois. From 1956 to 1963, I was associated with The Borden Company in various capacities; from 1959 through 1961, I was Borden's General Manager in the Chicago area. In February 1963, I and three other associates bought Wanzer, and since that time I have been the President and Chief Executive Officer of that company.

My company, Wanzer, has for 75 years been in the business of processing and selling packaged milk and other dairy products at wholesale and at retail in the Chicago, Illinois, metropolitan area. Our business presently is divided into four approximately equal parts: sales to grocery and other stores; retail home delivery sales; sales to institutional accounts; and sales to vendors or distributors, who resell the milk. The annual sales of my company total over $15 million and the company's assets are approximately $2.6 million.

[fol. 62] My company, Wanzer, is a subsidiary of S. W. Milk Corporation, the stock of which is owned by myself and three other persons. For some time, my associates and I have been interested in expanding the operations of our company. To this end, over a period of the past two years we have invested $1.5 million in a milk processing plant. Moreover, my associates recently acquired all the stock of Western-United Dairies, which was then converted from a processor and distributor into a vendor which purchases its milk for resale from Wanzer. We have also been interested in acquiring all or part of the assets of

Bowman Dairy Company, particularly those located in the Chicago, Illinois, metropolitan area. In August of this year, one of my associates made some inquiries through the First National Bank of Chicago about possible purchase of Bowman.

My associates and I continue to be seriously interested in acquiring Bowman as a going concern, and continuing its operations in the Chicago market. We are ready to enter into negotiations with Bowman or its representatives to this end. A $10 million to $15 million figure for the Bowman assets would not deter us, if the value of the assets involved warranted such a figure.

/s/ Henry A. Soldwedel.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 20th day of December, 1965.

Rita B. Votel, Notary Public, District of Columbia.

My commission expires on Nov. 14, 1969.

[fol. 63] EXHIBIT G

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION PENDENTE LITE

The United States Court of Appeals for the Seventh Circuit, having jurisdiction over the parties and over the subject matter; and the Federal Trade Commission, having filed a Complaint against Dean Foods Company and Bowman Dairy Company, charging them with violation of statutes administered by the Federal Trade Commission; and it appearing to the Court that the Federal Trade Commission has shown that it is probable that Dean Foods Company and Bowman Dairy Company will be adjudged by it to have violated such statutes; and it having been shown that entry of a preliminary injunction by the Court in the premises is in the public interest; and the parties [fol. 64] having been duly heard upon due notice in respect to this matter by the Court; the following findings of fact and conclusions of law are made:

Findings of Fact

1. Dean Foods Company (hereafter referred to as "Dean") is a corporation doing business within the State of Illinois, with its principal office at 3600 River Road, Franklin Park, Illinois.

2. Bowman Dairy Company (hereinafter referred to as "Bowman") is a corporation doing business within the State of Illinois, with its principal office at 140 West Ontario Street, Chicago, Illinois.

3. On December 13, 1965, Dean and Bowman entered into an agreement with one another. This agreement provides that Bowman sell to Dean all of its plants and equip-

ment, accounts receivable, inventories, leases and leasehold interests, the name "Bowman" and other trademarks and trade names, "the benefit of all relationships with customers and suppliers," all customer and supplier lists, and various other tangible and intangible assets.

4. On December 20, 1965, petitioner, the Federal Trade Commission, issued its Complaint, charging that the afore- [fol. 65] said agreement and acquisition were in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, statutes administered by the Federal Trade Commission. An administrative proceeding instituted under the applicable statutes, to determine the legality of the aforesaid agreement and acquisition, is now pending before the Commission.

5. The transfer of title, under the aforesaid agreement, is presently scheduled for January 10, 1966. Shortly thereafter, a substantial portion of the business and the assets of Bowman will be materially altered or disposed of, thereby substantially decreasing the possibility of subsequently undoing the transaction and of restoring Bowman, as a viable, independent competitor.

6. On the basis of the affidavits submitted, it appears probable that at trial a *prime facie* violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act will be established, in respect to the aforesaid agreement for Dean's acquisition of Bowman. In this connection, it appears that the proposed acquisition will result in the combination of two major competitive factors [fol. 66] in the sale and distribution of packaged milk (SIC product code 20262) (shown probably to be the relevant product market or "line of commerce") in the Chicago Federal Milk Marketing Order Area (shown probably to constitute a relevant geographic market or "section of the country"); at present, Dean probably enjoys approximately 7% of such sales, Bowman probably enjoys approximately 16% of such sales, and the other two leading sellers in the market probably enjoy approximately another 19% of such sales between them. There has recently been a trend in the Chicago Area toward the elimination of smaller, independent dairy companies, by merger or otherwise.

7. It appears unlikely that, and respondents have not

shown it probable that, this *prima facie* case will be rebutted. Bowman appears to be in sound financial condition; in 1964, it had assets of $27 million, net sales of $77 million, and an earned surplus of over $10 million. It has not been shown that Bowman faces the grave probability of a business failure. It is not the case that the only alternatives presented for Bowman are liquidation (through a receiver or otherwise) or an outright sale. Nor has it been shown that Dean is the only available purchaser of Bowman.

[fol. 67] Conclusions of Law

1. This Court has jurisdiction to review any final order of the Federal Trade Commission entered against Dean or Bowman in respect to the agreement and acquisition referred to in Finding No. 3, at the close of the administrative proceeding in respect thereto referred to in Finding No. 4. Clayton Act, § 11(c), 15 U.S.C. § 21(c); Federal Trade Commission Act, § 5(c), 15 U.S.C. § 45(c). Such review will entail this Court's entry of its own final order in respect to the matter.

2. This Court has the power to issue any writ necessary or appropriate to prevent the impairment of such jurisdiction. 28 U.S.C. § 1651(a); *Board of Governors* v. *Transamerica Corp.*, 184 F.2d 311 (C.A. 9th Cir. 1950), *cert. denied*, 340 U.S. 883 (1950); *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671 n.22 (1963).

3. There has been a showing of likelihood that the agreement and acquisition involved will ultimately be found by the Federal Trade Commission to be in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). [fol. 68] There has been a showing of likelihood that changes in the business and the assets of Bowman will be made which will substantially decrease the probability of entry of a final order in the premises which will fully serve the public interest and carry out the remedial policy of the aforesaid statutes. In the circumstances, this Court deems it appropriate to issue a preliminary injunction to preserve the status quo *pendente lite*, in aid of its jurisdiction.

Wherefore, It Is Ordered, Adjudged, and Decreed: That respondents, Dean and Bowman, are enjoined from taking any further steps to consummate their Purchase Agreement of December 13, 1965, and from making any changes, directly or indirectly, with respect to the capital stock or corporate structure of Bowman or in the business, operations, and policies of Bowman in any respect other than those changes made in the ordinary course of business pending entry of a final order (as "final order" is defined in 15 U.S.C. §§ 21 and 45) in respect to the proceeding now pending before the Federal Trade Commission.

[fol. 69] EXHIBIT H

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No.

FEDERAL TRADE COMMISSION, Petitioner

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER

This Court having before it an "Emergency Petition for Preliminary Injunction, Temporary Restraining Order, and Other Relief in Aid of the Jurisdiction of the Court," filed by the Federal Trade Commission against Dean Foods Company (hereafter referred to as "Dean") and Bowman Dairy Company (hereafter referred to as "Bowman"); said petition being accompanied by a Complaint filed against Dean and Bowman by the Federal Trade Commission, instituting an administrative proceeding against them which is now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean, and charging that such agreement and acquisition are in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 [fol. 70] and 45; and it appearing to the Court that there is substantial likelihood that such agreement and acquisition will ultimately be adjudged in violation of such statutes; and it appearing to the Court than Dean and Bowman now threaten the performance of such agreement and the consummation of such acquisition, and that thereupon or shortly thereafter there will take place material alterations in the business or assets of Bowman which, to the irreparable injury of the public, will render difficult or impossible the restoration of the status quo ante; and it appearing to the Court that this threatened action will therefore defeat or impair its jurisdiction in the premises, under Section 11(c) of the Clayton Act and Section 5(c)

of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c) and 45(c), to enter an effective final order in respect to this matter;

Now, Therefore, It Is By the Court, this — day of January, 1966,
Ordered that:

(1) Dean and Bowman are hereby restrained from carrying out the whole or any part of their "Purchase Agreement" dated December 13, 1965;
[fol. 71] (2) Dean is hereby restrained from acquiring any stock or assets of Bowman;
(3) Bowman is hereby restrained from making any changes, directly or indirectly, with respect to its corporate structure or properties, or in its operations or business other than those changes made in the ordinary course of business.

It is Further Ordered that this restraining order shall expire on the "Termination Date," defined as follows:

(1) If this Court issues a preliminary injunction or other protective order in respect to the Dean acquisition of Bowman, the "Termination Date" shall be the effective date of such injunction or order;
(2) If this Court issues no preliminary injunction or other protective order in the premises, the "Termination Date" shall be five (5) days after this Court issues its judgment in the premises, except as provided in the following paragraph;
(3) If, upon the application of the Government, a Justice of the United States Supreme Court issues or denies a stay or like order in the premises, the "Termination Date" shall be the effective date of such order or the denial thereof.

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE and LUTHER M. SWYGERT

No. 15493

[Title omitted]

ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER—January 4, 1966

This Court having before it an "Emergency Petition for Preliminary Injunction, Temporary Restraining Order, and Other Relief in Aid of the Jurisdiction of the Court," filed by the Federal Trade Commission against Dean Foods Company (hereafter referred to as "Dean") and Bowman Dairy Company (hereafter referred to as "Bowman"); said petition being accompanied by a Complaint filed against Dean and Bowman by the Federal Trade Commission, instituting an administrative proceeding against them which is now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean, and charging that such agreement and acquisition are in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45; [fol. 73] and it appearing to the Court that there is substantial likelihood that such agreement and acquisition will ultimately be adjudged in violation of such statutes; and it appearing to the Court that Dean and Bowman now threaten the performance of such agreement and the consummation of such acquisition, and that thereupon or shortly thereafter there will take place material alterations in the business or assets of Bowman which, to the irreparable injury of the public, will render difficult or impossible the restoration of the status quo ante; and it appearing to the Court that this threatened action will therefore defeat or impair its jurisdiction in the premises, under Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(c) and 45(c), to enter an effective final order in respect to this matter;

Now, Therefore, It Is By the Court, this 4th day of January, 1966,
Ordered that:

(1) Dean and Bowman are hereby restrained from carrying out the whole or any part of their "Purchase Agreement" dated December 13, 1965;
[fol. 74] (2) Dean is hereby restrained from acquiring any stock or assets of Bowman;
(3) Bowman is hereby restrained from making any changes, directly or indirectly, with respect to its corporate structure or properties, or in its operations or business other than those changes made in the ordinary course of business.

It Is Further Ordered that this restraining order shall expire on the "Termination Date," defined as follows:

(1) If this Court issues a preliminary injunction or other protective order in respect to the Dean acquisition of Bowman, the "Termination Date" shall be the effective date of such injunction or order;
(2) If this Court issues no preliminary injunction or other protective order in the premises, the "Termination Date" shall be five (5) days after this Court issues its judgment in the premises, except as provided in the following paragraph;
(3) If, upon the application of the Government, a Justice of the United States Supreme Court issues or denies a stay or like order in the premises, the "Termination Date" shall be the effective date of such order or the denial thereof.

[fol. 75] Judge Swygert:

As a member of the panel, I vote not to act on the petition for temporary restraining order until the "emergency petition for preliminary injunction, temporary restraining order, and other relief in aid of the jurisdiction of the court" is heard on January 6, 1966, it being represented in the petition that by agreement of counsel the transfer of Bowman Dairy Company assets to Dean Foods Company, originally scheduled for January 3, 1966, has been deferred to January 10, 1966.

[fol. 76] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

MOTION TO VACATE ORDER IN RESPECT TO APPLICATION FOR TEMPORARY RESTRAINING ORDER—Filed January 5, 1966

Now come the respondents, Dean Foods Company and Bowman Dairy Company, by their attorneys, and respectfully move that at the conclusion of the hearing in this cause on January 6, 1966, this Honorable Court forthwith vacate the "Order In Respect To Application for Temporary Restraining Order" entered upon the *ex parte* motion of the petitioner on January 4, 1966, for the reasons set forth in the attached affidavit of Hammond E. Chaffetz, one of the attorneys for the respondent Dean Foods Company.

Respectfully submitted, Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, William R. Jentes, Lawrence Gunnels, Attorneys for Respondent, Dean Foods Company.

[fol. 77] AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

HAMMOND E. CHAFFETZ, being first duly sworn on oath, deposes and says:

1. That he is counsel of record for the Respondent Dean Foods Company in this cause.

2. That affiant was advised on January 4, 1966, by the Clerk of the Court that the Court had entered an "Order in Respect to Application for Temporary Restraining Order" requested upon *ex parte* application of petitioner, the Federal Trade Commission.

3. That on January 5, 1966, the respondents are filing with the Court (contemporaneously with this Motion to Vacate) their Brief and Supporting Affidavits in Opposition to the Federal Trade Commission's Emergency Petition for Preliminary Injunction; it is believed that the respondents' brief, affidavits and argument will conclusively demonstrate not only that the Commission has no case on the merits of its attack against the merger of the respondents, but also that the Commission has no standing or power as a matter of law to obtain either preliminary injunctive relief or a temporary restraining order in this proceeding.

[fol. 78] 4. That closing of the merger agreement between respondents already has been inordinately delayed and postponed. Any additional delay beyond the latest postponement date of January 10, 1966, will seriously, if not fatally, jeopardize the entire transaction, particularly in light of the widespread publicity generated by the Commission's action herein and the inevitable decline in Bowman's patronage and business relations suffered as a direct result.

Further affiant sayeth not.

Hammond E. Chaffetz.

Subscribed and Sworn to before me this 5th day of January, 1966.

——, ——, Notary Public.

[fol. 79] Proof of Service (omitted in printing.)

[fol. 80] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

APPENDIX TO RESPONDENTS' JOINT BRIEF IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S EMERGENCY PETITION FOR A PRELIMINARY INJUNCTION AND OTHER RELIEF—Filed January 5, 1966

Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, William R. Jentes, Lawrence Gunnels, Donald Kempf, Attorneys for Respondent, Dean Foods Company.

January 5, 1966.

INDEX

1. Francis H. Kullman, Jr.	Chairman of the Board, Bowman Dairy Company
2. Sam E. Dean	Chairman of the Board, Dean Foods Company
3. William S. Turner	Senior Vice-President, The Northern Trust Company
4. E. Vance Clark	Senior Trust Officer, Central Trust Company of Cincinnati
5. Johnston A. Bowman	Vice-Chairman of the Board, Bowman Dairy Company
6. Leonard Spacek	Partner and Chairman, Arthur Andersen & Co.
7. Walter Schaub	Chairman of the Board, Scot Lad Foods, Inc.
8. Walter E. Roney	President, Roney Ice Cream Company
9. Fred Nonnamaker	Executive Secretary, Associated Milk Dealers, Inc.
10. A. L. McWilliams	General Manager, Pure Milk Association
11. Anthony C. Karlos	Chairman of the Board, Grocerland Co-Operative, Inc.

[fol. 82] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF FRANCIS H. KULLMAN, JR., IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

FRANCIS H. KULLMAN, JR., being first duly sworn, on oath deposes and says that:

1. He has been employed by the Bowman Dairy Company since 1915 and since 1962 has been Chairman of Bowman's Board of Directors.

2. Due to a variety of factors, most of which are the outgrowth of Bowman's historic commitment to retail home delivery milk sales, the company's operations have witnessed a marked decline in recent years.

3. As the following table shows, during the past five years annual sales of the Bowman Dairy Company have declined by nearly $9,000,000, or over 10 percent:

Net	Sales
1960	86,447,911
1961	82,835,515
1962	80,859,960
1963	77,813,577
1964	77,605,416

4. While Bowman's sales have declined, its profits have disappeared. In 1964 the company suffered an operating loss of $699,488.

5. Despite strenuous efforts by Bowman management in recent years to halt this trend, it was management's conclusion that the company's fortunes would most probably become worse instead of better in future years.

6. One of the principal factors leading to the decline in Bowman's fortunes has been the historical change in the distribution pattern of dairy products.

7. Prior to the 1920's dairy products were distributed by means of home delivery routes, particularly in large urban centers. During that era, Bowman developed the largest home delivery business in Chicago. At its zenith, Bowman had over 2200 retail routes in the Chicago area and was a healthy and profitable dairy company.

8. During the 1920's and 1930's, however, retail stores

began to replace home delivery as the primary means of distributing dairy products.

9. This trend away from home delivery continues today, with the result that this mode of distribution has been drying up. As the following table shows, Bowman's annual home delivery business is down over $5,000,000 in sales from what it was in 1960:

Net Sales, Chicago Retail and Mixed Divisions

1960	25,831,484
1961	24,281,876
1962	24,264,061
1963	21,745,922
1964	19,977,623

[fol. 84] Not only is it a steadily declining portion of the dairy business, but it has been increasingly unprofitable for Bowman. In 1964, Bowman lost $1,571,989 on its Chicago operations due primarily to its home delivery business and a loss of over $900,000 is expected to be reported by Bowman on its Chicago operations for 1965. Bowman's total sales and net operating losses in Chicago for the past five years are set forth in the following table:

	Sales	Net Operating Losses
1960	56,796,962	($ 197,459)
1961	53,089,958	(678,127)
1962	52,628,675	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)
Average Annual Loss		($ 736,746)

10. Unfortunately Bowman was extremely late in seeking to adapt itself to this change in the pattern of milk distribution. Instead of seeking to secure a foothold in the expanding wholesale distribution of dairy products to retail stores, Bowman for many years concentrated its efforts on protecting and preserving home delivery distribution. This was due in part to Bowman's heavy investment in the home delivery business, which it felt it must protect. It was also reluctant to enter into costly price-cutting battles with [fol. 85] the other dairies for the growing—but still relatively small—wholesale distribution business. For one thing, any attempt to secure store accounts by submitting a low bid would also have tended to reduce the home delivery price structure where Bowman had the vast bulk of its

sales. These factors explain why Bowman did not get into the wholesale distribution of dairy products on the ground floor.

11. By the time Bowman did make serious efforts to build its wholesale distribution, other dairies were already firmly entrenched with the larger accounts. Bowman has made a number of attempts to secure those accounts through competitive bidding, but has generally been unsuccessful. Present suppliers are frequently given the opportunity to match any bid submitted by Bowman. Only this past year Bowman sought to secure the A & P account in Chicago, but lost out to Borden, even though its bid was cut to the competitive minimum.

12. Bowman's inability to build a substantial wholesale operation in Chicago has handicapped it in a number of ways. The cost of distributing milk on home delivery routes has steadily mounted relative to the cost of distributing milk on wholesale routes. The stores and supermarkets being built today are large volume operations. As a result, dairy companies distributing primarily through wholesale routes are able to use large trucks which dispose of their [fol. 86] entire load in a relatively few stops. Dairies, such as Bowman, with extensive home delivery routes, however, suffer not only from the fact that their deliveries are being made to a large number of housewives with very small individual requirements, but also from the fact that, as more housewives switch from home delivery to store purchasing, the distance between home delivery stops is constantly increasing. In Bowman's case, its routes dropped from a high of 2200 to well below 500, and further consolidation of routes has become almost impossible.

13. Bowman's contract with the Teamsters' Union has been another important factor contributing to the steadily mounting costs of home delivery. No allowance has been made by the union for the fact that the home delivery route man cannot deliver nearly as much milk as the wholesale route man. Almost equal pay has been required, with the result that labor costs on a home delivery route are about five times as much per quart as on a wholesale route. In addition, the union in Chicago has maintained the base pay at about 90 percent of the workers' potential top pay. This has all but eliminated the use of commissions as an incentive to the employee to build his route by soliciting new

customers. Finally, the union requirement that older men remain and younger men be discharged in any consolidation of routes effectively locked Bowman in with its oldest and often times least productive drivers.

14. It is probable that Bowman's home delivery plight is among the worst of any dairy in Chicago.

[fol. 87] 15. Smaller dairies generally get a better break in their dealings with the union. It is easier for them to discharge inefficient drivers and to insure that they have a number of young and aggressive drivers who will make a real effort to maintain their retail routes at a high level. In addition, small dairies generally have lower overhead expenses.

16. The larger dairies having a home delivery business (such as Borden and Hawthorn Mellody) also enjoy advantages over Bowman. These companies distribute a much larger percentage of their milk on wholesale routes. With this large wholesale volume to fill their plants, they have been able to eliminate their less efficient routes completely and preserve only their high volume, relatively low cost retail routes. Bowman, on the other hand, has had a relatively small percentage of its volume in the wholesale business. Any attempt to trim its routes as Borden and Hawthorn Mellody have done would mean running the River Forest plant at less than 50 percent capacity with the result that the cost per unit of milk would rise sharply.

17. Bowman's problems do not lie only in its home delivery business, however. Because of its late entry into wholesale distribution, the store accounts it did secure were predominantly of the "Ma and Pa" variety. As the retail food business has trended toward fewer but larger stores, many of these Bowman outlets went out of business. Even with respect to the few large store accounts that Bowman [fol. 88] has secured, its position is extremely vulnerable. Kroger and High-Low, Bowman's two largest individual accounts, have not matched the growth rate of the other chains in the Chicago area. Moreover, Kroger has already opened its own dairies in Dayton, Indianapolis and Cincinnati, is building a plant in Detroit, and has indicated it may eventually build one in the Chicago area as well.

18. While Bowman has had its largest volume of sales and its most pressing difficulties in the Chicago market, substantial operating and financial difficulties also exist at

the present time in a number of its other plants and the situation is likely to deteriorate further in the future.

19. All of Bowman's plants are old, overcrowded, and in need of modernization. The newest plant is in Bettendorf, Iowa, and even that is over 20 years old.

20. Bowman has been unable to keep pace with the rest of the dairy industry in automation, mechanization, or materials handling trends. Bowman has not had a planned program of upgrading its operations and little money has been spent on new equipment designed to cut overhead and labor costs and to improve quality. Refrigerated storage rooms are too small to maintain adequate inventories. In most of its plants Bowman lacks the clean-in-place pipeline systems that most of the other dairies have adopted as a means of controlling sanitation. Bowman's bottling and refrigerating operations are, for the most part, out of date [fol. 89] and inefficient. Most Bowman plants do not have the automatic casers, automatic stackers, and palletized transportation systems required for an efficient dairy operation. In fact, the only plant in which Bowman has made significant capital improvements in recent years has been the River Forest plant where Bowman carried out a million dollar modernization program in 1964. Even that did not stop the losses, however. It is expected that the River Forest plant will report a continuation of the decline in sales and a loss of over $900,000 in 1965.

21. The outcome of the River Forest modernization attempt is particularly discouraging since the company cannot maintain its volume and should not pump large amounts of money into plant modernization when there is no chance that this will enable it to get an adequate return on the investment. At the same time, the failure to modernize leaves Bowman's plants at an increasing competitive disadvantage.

22. As a result of the fact that, with the one unsuccessful exception of its River Forest plant, Bowman has not reinvested money in its plants in order to keep them at the minimum industry standard, the plants have become rundown and inefficient and have had excessive operating costs. As the following tables show, in addition to its Chicago dairy operations, three of Bowman's other divisions are running in the red and four of its other divisions had declining sales in 1964:

[fol. 90] Bowman's Loss Operations

Division	Net Operating (Loss)
Chicago, Illinois	(1,571,989)
Cleveland, Ohio	(51,843)
Saginaw, Michigan	(21,905)
Parade Products, Inc.	(3,076)

Bowman's Operations With Declining Sales

Division	1963 Sales	1964 Sales	Change
Chicago, Illinois	48,993,885	46,596,008	(2,397,877)
Columbus, Ohio	3,138,937	2,717,366	(421,571)
Tomah, Wisconsin	597,014	555,020	(41,994)
Cremix	787,278	737,318	(49,960)
Forest Milk	1,373,293	1,311,952	(61,341)

Some of the divisions that are not in the red have profits far below what their profits should be and what the profits of similar operations by other dairy companies actually are. Bowman's New Albany, Indiana, division, for example, was able to show a mere $12,458 profit in 1964 despite a sales volume of $3,526,853. In 1963 a $5,969 loss was reported by New Albany.

23. Bowman has, in effect, been living off the combination of its depreciation and income from non-dairy investments and the sale of property. Bowman has been able to show slight overall profits in some years only because it has contracted dairy operations by selling off plants, [fol. 91] equipment, and other property. Since 1950 the following major property dispositions have been made by Bowman:

Closed Harvard, Illinois bottling plant
Closed La Salle bottling plant
Closed Mayfair bottling plant
Closed Montrose bottling plant
Closed Ridgeview bottling plant
Closed State Street bottling plant
Sold Terre Haute bottling plant
Closed Sales Divisions:

(a) Elston Store
(b) Englewood
(c) Evanston Retail
(d) Central Wholesale
(e) Irving Park
(f) Leyden

(g) North Industrial
(h) Oak Lawn
(i) South Shore
(j) Washington Heights

Sold Wabash Street garage
Sold Evanston Division garage
Closed Addison ice cream plant
Sold KPA Warehouse
Sold Central Office building and moved into rented facilities
Lease of Huebner plant to Michigan Milk Producers

24. Bowman's purchase of the assets of Capitol Dairy in October of 1965 had no effect on Bowman's volume since Bowman had already been bottling all of Capitol's milk for several years. Capitol had total sales in 1964 of $3,673,071 (all Bowman milk under the Capitol label). The purchase [fol. 92] price for Capitol's assets was $367,000 and much of this was recovered by liquidating Capitol's trucks and real estate. Capitol's customers were primarily the small stores which have been losing business to larger cooperative and chain supermarkets. Capitol was acquired only in the hope that Bowman's excessive distribution costs could be reduced somewhat by adding Capitol's deliveries to Bowman's existing routes.

25. In view of these and other factors, Bowman management concluded that realistically it had only two choices: sell out or adopt a program of self-liquidation.

26. It was unfeasible to think that an internal solution to Bowman's operating and financial difficulties could be found. The decline in home delivery sales, the union problems, and geographic customer dispersion made further consolidation of retail routes all but impossible. Furthermore, there was no way to dispose of the home delivery business and still have a large enough volume at the River Forest plant to maintain operating efficiency. The company had already experienced a loss in volume which had forced it to close all Chicago area bottling plants except River Forest and to dispose of a number of retail distribution branches.

[fol. 93] 27. Faced with the fact that each day the company operated it lost money and that there was no possi-

bility of bringing about an internal solution to this problem, Bowman's management concluded that the best course was to try to find an immediate buyer rather than to work out a piecemeal liquidation during the course of the next few years.

28. From casual discussions which had been had with several other dairies over the years, the management was aware that there were few, if any, companies which would be interested in purchasing Bowman's operations. Management also realized that publicity concerning its desire to sell out would lead to the raiding of Bowman's accounts by other dairies and the loss of other customers seeking a more certain future source of supply. Many accounts have already expressed uneasiness concerning their future source of milk supply. Nevertheless, in the very recent past, Bowman management discussed a possible sale with Carnation, Fairmont and Consolidated Badger. None was interested in making an offer. The orders which the Federal Trade Commission had secured against further acquisitions by the industry giants (National, Borden, Beatrice, and Foremost) precluded Bowman from considering a sale to those companies. Consideration was also given to the possibility of seeking a purchaser among companies not [fol. 94] presently in the dairy business. However, expert advice from the company's investment banker indicated that there would be no companies which would be interested in purchasing Bowman for other than liquidating purposes and that the price would be extremely low. In this state of affairs, Bowman's management approached Dean Foods Company.

29. Even Dean, the only purchaser who expressed any real interest in purchasing Bowman, was willing to pay no more than two-thirds of the company's net worth. Nevertheless, this offer was the only reasonable offer which Bowman could secure and, accordingly, management decided to accept it. Those controlling a sufficiently large percentage of Bowman's stock to effect their desires have indicated that, in the event that the proposed sale of Bowman's operating assets to Dean is not consummated, they will seek a liquidation of Bowman's dairy operations as soon as practicable. Thus, whether or not it is permitted to sell to Dean, Bowman will withdraw from the dairy business.

30. If an injunction is issued preventing the Bowman Dairy Company from selling its operating assets to the Dean Foods Company, Bowman and its shareholders, employees, and customers will suffer irreparable injury.

31. Bowman has been informed by the Dean Foods Company that if Bowman is enjoined from selling its operating assets to Dean at the present time, Dean will be forced to withdraw from the transaction entirely.

[fol. 95] 32. Cancellation of this transaction would force Bowman to continue its dairy operations until a piecemeal liquidation can be completed. Each day that Bowman continues its dairy operations in Chicago it will lose thousands of dollars and the company's net worth will continue to decline.

33. The liquidation of Bowman's operating assets on a piecemeal basis will return far less than the amount which Dean has agreed to pay and will thus cause Bowman's shareholders to suffer a substantial loss. While Dean, a dairy company capable of integrating Bowman's facilities with its own, will pay less than two-thirds book value for Bowman's net worth, Bowman can expect to receive about 50 percent of book value if Bowman is liquidated on a piecemeal basis.

34. A substantial number of Bowman's present employees will be retained by Dean if Bowman is not enjoined from selling its operating assets to Dean. If, however, Bowman is forced to dispose of its dairy operations on the basis of a piecemeal liquidation, almost all of the company's employees will eventually be discharged.

35. An injunction preventing the smooth transfer of Bowman's dairy operations to Dean and forcing Bowman to liquidate will severely disrupt the milk supply to Bowman's customers, including many store accounts which have relied on and promoted the "Bowman" name.

[fol. 96] 36. If the proposed transaction is enjoined and Bowman is forced to liquidate its dairy operations on a piecemeal basis, the national giants of the dairy industry, at least one of which is in each of the markets which Bowman serves, will probably succeed in taking over many of Bowman's choicest accounts and thus add further to their market dominance.

37. Considering, among other things, the fact that Bow-

man would be compelled to liquidate its dairy operations if it did not sell out to Dean and the fact that there is no purchaser available other than Dean in a position to continue Bowman's dairy operations, it is affiant's opinion that the sale of Bowman's operating assets to Dean could not have any adverse effect on competition in general or on any supplier, customer or other dairy company in particular. If the transaction is enjoined, however, Bowman and its stockholders, employees, and customers will suffer irreparable injury.

In Witness Whereof the undersigned has executed this affidavit this 5th day of January, 1966.

Francis H. Kullman, Jr.

Subscribed and sworn to before me this 5th day of January, 1966.

Donna R. Nielsen, Notary Public.

[fol. 97] STATE OF ILLINOIS,
COUNTY OF COOK, ss:

AFFIDAVIT OF SAM E. DEAN IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

SAM E. DEAN, being first duly sworn, on oath deposes and says that:

1. Since 1930 he has been employed by and since 1952 has been Chairman of the Board of the Dean Foods Company.

2. The Dean Foods Company is a medium-sized, regional processor and distributor of dairy products and convenience foods with operations centered in the Midwest. Dean had 1964 sales of approximately $73,000,000, of which $65,460,000 were attributable to dairy products and $7,540,000 were attributable to convenience foods.

3. Prior to 1939 the Dean Milk Company—predecessor of the Dean Foods Company—was engaged primarily in the manufacture of powdered and condensed milk. In 1939, however, Dean began bottling milk at its plant in Chemung, Illinois. Dean concentrated its efforts on securing distribu-

tion of its dairy products through retail stores rather than through sales on home delivery routes. During the course of the next twenty years, Dean's sales grew steadily and its profits were satisfactory.

4. There has been a trend in recent years by chain stores and cooperative buying associations of independent stores [fol. 98] to introduce dairy products carrying private labels into their stores and, in many cases, eventually to begin to produce these dairy products themselves rather than purchase them from existing dairy companies. This development has had a significant competitive impact, particularly for independent grocers and independent non-affiliated dairy companies like Dean. Safeway took the lead in introducing private labels into grocery stores and now supplies its own dairy products to almost all its stores throughout the country. Safeway already has 16 captive fluid milk plants and larger dairy sales than Dean. Kroger has established its own plants in Indianapolis and Cincinnati, recently opened an additional plant in Dayton and is building a plant in Detroit. In Chicago the Certified cooperative chain owns Country's Delight and Scot Lad, a voluntary chain, owns Meadowmoor Dairy. A & P recently announced that it will also embark upon a private label program.

5. Because of the recent increase in the number of these captive dairies, independent non-affiliated dairy companies must maintain a high degree of efficiency in order to supply independent grocers and small chain stores with low cost dairy products that will enable them to continue to successfully compete with stores owning captive dairies. Any substantial loss in volume by an independent dairy increases the difficulty of maintaining the efficiency needed to compete effectively with the captive dairies.

6. In part because it recognized the growing trend by both chain and independent supermarkets to acquire or build their own dairy plants, Dean decided in the early [fol. 99] 1960's to embark upon a program of diversifying its product line. To this end the corporation's name was changed from the Dean Milk Company to the Dean Foods Company and Dean entered into the preparation and distribution of convenience food products such as pickles, relishes, cranberry products, salads, salad dressings, mayonnaise, and frozen prepared foods.

7. Despite this move, as the following table shows, there has been but a slight increase in Dean's sales and the company's profits have declined; in 1964 both sales and profits were down:

	1962	1963	1964
Net Sales	$72,325,226	$73,445,996	$72,999,745
Net Operating Profit	3,738,752	3,028,052	2,938,072

8. Over the years the Jewel Tea Company chain of stores has come to represent the largest outlet for Dean's dairy products. In 1964, for example, Dean sold over 20 percent of the dairy products which it produced to Jewel. In the Chicago area the figure was much higher, with Jewel purchasing over 75 percent of the milk which Dean sold in the Chicago market.

9. The Jewel Tea Company has recently notified Dean that it is considering an imminent switch to a private label and, in addition, producing its own dairy products and terminating its supply arrangements with Dean. Such a move by Jewel will have a significant adverse effect on Dean. There will be a substantial drop in profits, several plants will be left with substantial over-capacity, and some will probably have to be closed. Loss of volume will cause production cost per unit of milk to rise and will handicap [fol. 100] Dean's ability to offer significant and effective competition to the giants of the dairy industry.

10. The threatened imminent loss of the Jewel account has focused the Dean management's attention on the fact that its market position is extremely vulnerable and that immediate steps must be taken to broaden its distribution base if Dean is to remain a viable competitor in the dairy industry and if Dean is to continue to supply the low cost milk which is needed by independent grocers in order to remain competitive with those stores owning captive dairies. It was only in light of these factors that Dean gave serious consideration to Bowman's offer to sell out.

11. It is the opinion of the Dean management that the Dean and Bowman operations can be combined into an effective and healthy medium-sized dairy operation. Dean is probably unique in its ability to restore Bowman's operations to a profitable basis. While Bowman is unable to cure their problems from within, by combining the two operations there will be sufficient plant, equipment, and

customer flexibility to integrate them effectively. Dean plans to dispose of substantially all of Bowman's Chicago home delivery routes (approximately $20,000,000, or 50 percent of Bowman's total packaged milk sales in the Chicago market) by selling them to a number of small dairies. Negotiations with several of these smaller dairies have already begun. This will strengthen these dairies as well as Dean by enabling them to reduce distribution costs through route consolidation. Because of their small size, less onerous union contract enforcement, and combined ownership-management, these smaller dairies can operate [fol. 101] the home delivery business at a profit whereas Bowman cannot. Lack of replacement sales volume prevents Bowman from disposing of this business itself. Were Bowman to do so its plant would be operating substantially below capacity and cost per unit of milk would increase significantly.

12. Dean supplies approximately 7 percent of the dairy products sold in the Chicago area and it has been estimated that Bowman may supply as much as 16 percent. The Dean-Bowman transaction, however, will not raise Dean's share of the market to 23 percent. On the contrary, about 50 percent of the milk which Bowman produces is distributed on retail home delivery routes and, as already indicated, immediately following the transaction Dean will distribute substantially all of these routes among a number of the smaller dairies. Thus, even if Dean did not face the prospect of losing the Jewel account, the net effect of the transaction would be the creation of a single, healthy, medium-sized dairy of approximately the same size as Bowman's present operations and the simultaneous strengthening of a number of small dairies servicing the Chicago market. Since it is likely that Dean will, in fact, lose the Jewel Tea account, the most probable effect of the transaction will be to create a healthy medium-sized dairy which is slightly larger than Dean's present operations but substantially smaller than Bowman's present operations while strengthening a number of the smaller dairies.

13. If Bowman is enjoined from selling its operating assets to the Dean Foods Company, Dean will withdraw [fol. 102] from the entire transaction. Each day that Bowman remains in business its losses mount and the net worth

of its dairy operations declines. An injunction preserving the status quo would create an intolerable situation for Dean. Bowman's value would rapidly fall below the agreed upon purchasing price while Dean's ability to effectively integrate its operations with those of Bowman would constantly diminish. From Dean's standpoint completion of the transaction depends upon Dean's freedom to undertake immediate efforts to restore Bowman's operations to a profitable basis by transferring Bowman's home delivery routes to a number of smaller dairies, closing those Bowman plants which are old, inefficient and in need of modernization, and shifting the remaining volume to other facilities.

14. Enjoining the Dean-Bowman transaction would prevent the transfer of milk distribution which presently accounts for approximately 8 percent of the total Chicago area milk sales and 50 percent of Bowman's Chicago sales to a number of the smaller dairies in the Chicago area.

15. Considering among other things that the real effect of the Dean-Bowman transaction will be the creation of a healthy medium-sized dairy company and the strengthening of a number of smaller dairy companies, the sale of Bowman's operating assets to the Dean Foods Company will not pose any conceivable threat to competition, but, rather, will increase the ability of a substantial number of dairy companies to compete effectively. If the transaction is enjoined, however, Dean, Bowman, and a number of [fol. 103] other dairies in the Chicago area will suffer unwarranted and irreparable injury.

In Witness Whereof the undersigned has executed this affidavit this Fifth day of January, 1966.

Sam E. Dean.

Subscribed and Sworn to before me this 5th day of January, 1966.

Judith A. Wons, Notary Public.

[fol. 104] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF WILLIAM S. TURNER IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

WILLIAM S. TURNER, being first duly sworn on oath deposes and says that:

1. He is a Senior Vice President of The Northern Trust Company in charge of its Trust Department with offices at 50 South La Salle Street, Chicago, Illinois.

2. The Northern Trust Company is co-executor of the estate of the late Lula E. Bowman, which holds the largest single block of stock in the Bowman Dairy Company. It is also residual co-trustee of the stock under a charitable trust. Included in the Lula E. Bowman estate are 32,600, or approximately 21 percent, of the 153,400 shares of Bowman stock issued and outstanding.

3. The Northern Trust Company, in its fiduciary capacity as co-executor and as co-trustee of the Lula E. Bowman estate, carefully and independently evaluated their future income requirements and the advisability of maintaining the present investment in Bowman stock, particularly in light of the company's existing dairy operations.

[fol. 105] 4. After a careful consideration of the present condition and future prospects of Bowman, The Northern Trust Company concluded that the continued operation of Bowman's dairy business on its present basis was unwarranted and that these operations should preferably be sold as a package or, if necessary, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere.

5. In accordance with its fiduciary obligations, The Northern Trust Company considered the prospects of securing an alternative offer to that received from the Dean Foods Company. While Dean's offer was less than two-thirds of Bowman's net worth, it was the judgment of The Northern Trust Company that if the Dean offer could not be consummated it appeared likely that the only alternative was a program of self-liquidation or a sale to a company which would itself immediately liquidate Bowman's dairy operations. The Northern Trust Company concluded that the

return from such a liquidation program would be extremely low and that Dean was the only company that showed any interest in acquiring Bowman.

[fol. 106] 6. If Bowman is unable to sell its operating assets to Dean, The Northern Trust Company, as executor of approximately 21 percent of Bowman's stock, is fearful that liquidation of Bowman's dairy operations on a piecemeal basis is its only alternative.

In Witness Whereof the undersigned has executed this affidavit this 3rd day of January, 1966.

William S. Turner.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Betty J. Conlin, Notary Public.

My Commission Expires August 10, 1968.

[fol. 107] State of Illinois,
County of Cook, ss:

Affidavit of E. Vance Clark in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

E. Vance Clark, being first duly sworn, on oath deposes and says that:

1. For twenty years until 1964 he was a senior Trust Officer of the Central Trust Company of Cincinnati, Ohio, and as such Trust Officer had extended experience in examining and advising in reference to investments.

2. During this period of time I have acted as financial adviser to my aunt, Esther T. Bowman, who holds 14,600 shares of Bowman stock in her own name and 2,000 shares as trustee for her sisters. My wife and I own between us 2,000 shares of the said Bowman stock. There are outstanding 153,400 shares. The 18,600 shares so represented are approximately 12 percent of the issued and outstanding stock.

[fol. 108] 3. As such financial adviser to Esther T. Bowman and on behalf of myself and my wife as stockholders, I have carefully and independently evaluated the future income possibilities and the advisability of maintaining the present investment in Bowman stock, particularly in light of the company's existing dairy operations. I have also examined the feasibility of making further attempts to restore Bowman's dairy operations to a profitable basis through internal efforts.

4. After a careful consideration of the present condition and future prospects of Bowman, I have concluded and advised my aunt that the continued operation of Bowman's dairy business was totally unwarranted and that these operations should preferably be sold as a package or, at the very least, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere.

5. I have examined independently the offer received from Dean Foods Company. While Dean's offer amounts to less than two-thirds of Bowman's net worth, it was my judgment that the only alternative to the Dean offer was a program of self-liquidation or a sale of the company which [fol. 109] would itself immediately liquidate Bowman's dairy operations. I have concluded that the return from such a liquidation program would be extremely low and that the Dean offer would present a better return on the investment.

6. If Bowman is unable to sell its operating assets to Dean, as financial adviser to my aunt, Esther T. Bowman, I will, as her proxy, seek an immediate liquidation of Bowman's dairy operations on a piecemeal basis.

In Witness Whereof the undersigned has executed this affidavit this 3rd day of January, 1966.

E. Vance Clark.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Florence M. Lundquist, Notary Public.

[fol. 110] STATE OF ILLINOIS,
COUNTY OF COOK,

AFFIDAVIT OF JOHNSTON A. BOWMAN IN THE MATTER OF DEAN FOODS, INCORPORATED AND BOWMAN DAIRY COMPANY FOR PRELIMINARY INJUNCTION BY THE FEDERAL TRADE COMMISSION.

I, JOHNSTON A. BOWMAN, being first duly sworn depose and say that:

1. I am Vice-Chairman of the Board of Bowman Dairy Company, an Illinois Corporation,
2. That of the issued and outstanding shares of Bowman Dairy Company 12,840 stand in my name,
3. That I have acted as proxy for a period of twenty-four years on behalf of my daughter, Aveline Bowman Huntress, owner of 7,000 shares,
4. That I have acted as proxy for Virg & Co. trustees of a living trust for my sister, Grace Bowman Jones, voting as such proxy 8,560 shares,
5. That I have examined the audit reports prepared by Arthur Andersen & Company for the years 1960 to 1964, covering the Chicago operations of the package milk sales of Bowman Dairy Company in the area covered by the Market Order #30 issued by the U. S. Department of Agriculture.
6. I am also familiar with the unaudited figures supplied by the controllers for Bowman Dairy Company for the first eleven months of the year 1965.
7. That as a former treasurer of the company, as Chairman of the Finance Committee of the Company and as a Financial Advisor to the individual holdings of stock here and above listed I am of the opinion that a further commitment by the equity holders of Bowman Dairy Company in the Chicago area is not indicated. It is further my opinion that the operations of the Company in this area should be, in the most advantageous way available, liquidated.

Johnston A. Bowman.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Phil A. Nelson, Notary Public.

[fol. 111] STATE OF ILLINOIS,
COUNTY OF COOK, ss:

AFFIDAVIT OF LEONARD SPACEK REGARDING THE REQUEST OF THE FEDERAL TRADE COMMISSION FOR A PRELIMINARY INJUNCTION.

LEONARD SPACEK, first being duly sworn, on oath deposes and says:

1. That he is a certified public accountant in the State of Illinois, is a partner and chairman of the accounting firm of Arthur Andersen & Co. and has been in public accounting practice continuously since 1928.
2. The attached Statement of Net Operating Losses from Dairy Operations of Bowman Dairy Company (an Illinois corporation) was prepared from annual financial reports certified to by Arthur Andersen & Co., who have been the independent public accountants for Bowman Dairy Company since 1927.

   For the five years, 1960 through 1964, losses attributable to dairy operations in the Chicago, Illinois, area totaled $3,683,731. Substantial losses have been incurred in each of the five years; $197,459 in 1960, $678,127 in 1961, $618,315 in 1962, $617,841 in 1963 and $1,571,989 in 1964. Preliminary estimates by Bowman Dairy Company for the year 1965 indicate a loss of approximately $900,000 on a sales volume of $43,900,000.

   During this five-year period, net sales have declined from $62,095,506 to $47,577,268 but there have not been offsetting decreases in costs and expenses.

   This series of losses has had a significantly adverse effect on the working capital of the company and raises serious financial and operating questions as to the advisability of continuing the dairy operations in Chicago by Bowman Dairy Company.

Leonard Spacek.

Subscribed and sworn to before me this 5 day of January, 1966.

Mildred B. Heskett.

[fol. 112]

BOWMAN DAIRY COMPANY
(an Illinois Corporation)

(Corporate—Exclusive of Subsidiaries)

Statement of Net Operating Losses From Dairy Operations
for the Five Years Ended December 31, 1964

	Year Ended December 31					
	1964	1963	1962	1961	1960	Total
Net Sales	$ 47,577,268	$ 55,818,175	$ 58,344,131	$ 59,821,301	$ 62,095,506	$283,656,381
Cost of Sales	34,730,343	40,996,651	41,877,610	43,523,839	45,117,913	206,246,356
Gross profit on sales	$ 12,846,925	$ 14,821,524	$ 16,466,521	$ 16,297,462	$ 16,977,593	$ 77,410,025
Operating Expenses:						
Delivery	$ 12,079,085	$ 12,908,267	$ 14,248,170	$ 14,013,649	$ 14,296,263	$ 67,545,434
General selling and administration	2,339,829	2,531,098	2,836,666	2,961,940	2,878,789	13,548,322
	$ 14,418,914	$ 15,439,365	$ 17,084,836	$ 16,975,589	$ 17,175,052	$ 81,093,756
Net operating losses from dairy operations	$ (1,571,989)	$ (617,841)	$ (618,315)	$ (678,127)	$ (197,459)	$ (3,683,731)

[fol. 113] State of Illinois,
County of Cook, ss:

Affidavit of Walter Schaub in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

Walter Schaub, being first duly sworn, on oath deposes and says that:

1. He is the Chairman of the Board of Scot Lad Foods, Inc. and the President of Meadowmoor Dairy Company, one of its divisions, with offices at 1500 East 97th Street, Chicago, Illinois.

2. It is his best recollection that some time during the week of November 29, 1965, he talked with Henry A. Soldwedel, President of Sidney Wanzer & Sons, Inc., on the telephone. During the course of that conversation, Mr. Soldwedel stated that he understood Bowman was considering a sale of its dairy operations and that Bowman was negotiating with Dean.

3. As affiant told Mr. Soldwedel during the foregoing telephone conversation, affiant does not believe that a sale of Bowman's dairy operations to Dean will have any adverse effect on Meadowmoor's dairy business or on competition in the dairy industry generally. Dairy competition, especially in the Chicago market, is extremely vigorous and tending to become more so.

In Witness Whereof the undersigned has executed this Affidavit this 3rd day of January, 1966.

Walter B. Schaub.

Subscribed and Sworn to before me this 3rd day of January, 1966.

Muriel F. Rosebraugh, Notary Public.

[fol. 114] STATE OF ILLINOIS,
County of Cook.

AFFIDAVIT OF WALTER E. RONEY

I, WALTER E. RONEY, President of the Roney Ice Cream Company, being first duly sworn depose and say that on Thursday, November 11, 1965, I had lunch with Henry Soldwedel and Robert Smith. At this time, Henry Soldwedel told me that there was a merger contemplated between Bowman Dairy Company and Dean Foods, Inc. He stated that one of the Bowman widows, who controlled a large block of stock, had died and that because of the problems arising in the settling of the estate, this merger was being contemplated.

Walter E. Roney

Subscribed and Sworn to before me this 4th day of January, 1966.

Johanna Koris, Notary Public.

[fol. 115] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF FRED NONNAMAKER IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

FRED NONNAMAKER, being first duly sworn, on oath deposes and says that:

1. I am the Executive Secretary of the Associated Milk Dealers, Inc., with offices at 309 West Jackson, Chicago, Illinois. The Associated Milk Dealers, whose membership consists of approximately 30 milk processors and distributors in the Chicago milk marketing area, represents substantially all of the dairies in the market.

2. I was first employed by the Association in 1936 and have acted as its Executive Secretary since 1948. In my capacity as Executive Secretary, I have intimate daily contact with milk processors and distributors, both large and

small, in Chicago and throughout the nation. Through the years I have become fully acquainted with the Chicago milk market and the problems of the dairies serving the area. Among other duties, I have participated in the labor negotiations of the Association's membership, presented the Association's position at Federal Milk Marketing Order hearings and participated in the activities of the Milk Industry Foundation, which is the industry's national trade association.

3. Based upon my long acquaintance with the Chicago market and the dairy industry generally, it is my firm con- [fol. 116] viction that Bowman's sale of its dairy operations to Dean will have no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally. There are presently a large number of aggressive and vigorous dairies in the Chicago market and it has been my observation that competition has been increasing rather than decreasing. I cannot conceive that the Dean acquisition would give it any market power which would permit it to adversely affect the operations of smaller dairies in the Chicago market. On the contrary, it is my understanding that Dean plans to sell Bowman's home delivery routes to many of these smaller firms and this step will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency.

In Witness Whereof the undersigned has executed this affidavit this 4th day of January, 1966.

Fred Nonnamaker.

Subscribed and Sworn to before me this 4th day of January, 1966.

Sandra B. Mitchell, Notary Public.

[fol. 117] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF A. L. MCWILLIAMS IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

A. L. MCWILLIAMS, being first duly sworn, on oath deposes and says that:

1. He is General Manager of the Pure Milk Association. Pure Milk Association is a dairy farmer cooperative with approximately 11,000 dairy farmer members in Illinois, Indiana and Wisconsin. Pure Milk Association is the largest farmer cooperative in the Chicago market and supplies most of the dealers in the marketing area with the major part of their milk supply.

2. Prices to farmers will not be affected by Bowman's sale of its dairy operations to Dean because prices to farmers are determined through a Federal order and a superpool. Federal order prices are established by the U. S. Department of Agriculture after a public hearing in which all interested parties have an opportunity to participate. The size of the handlers is not important in this price-making process. Superpool prices are established by Federated Dairy Cooperatives, a bargaining association which represents 85 percent of the milk delivered to the Chicago mar-
[fol. 118] ket by farmers. Pure Milk Association is a member of the Federated Dairy Cooperatives. There is no reason to believe that this price arrangement would be either helped or hurt by the fact that the Dean and Bowman operations were combined.

3. Affiant understands that, following the acquisition, Dean plans to sell a substantial portion of Bowman's business to smaller dairies in the Chicago area. It is affiant's opinion that such a step will benefit the smaller dairies and increase their competitive vitality.

4. Pure Milk Assocation operates a relatively small dairy servicing the Chicago market. It is affiant's opinion that the proposed sale of Bowman's dairy operations to Dean will not adversely affect this dairy operation or those of other small dairies servicing the Chicago market.

5. Finally, in affiant's opinion the proposed sale of Bow-

man's dairy operations to Dean will actually benefit the interests of Pure Milk Association's members for the following reasons:

a. The dairy business needs vigorous promotion, advertising and sales effort. Dean has done an outstanding job in this area and affiant believes that the promotion of milk would probably be increased as a result of the sale.

b. The best interests of farmers are served by reducing the price spread between the producer and the consumer. This can best be done through efficient operations. Af- [fol. 119] fiant believes that efficiency would be increased by the proposed sale.

c. Dairy farmers generally, and Pure Milk Association in particular, have enjoyed good relationships with both companies and affiant anticipates that these relationships will be continued.

In Witness Whereof the undersigned has executed this affidavit this 5th day of January, 1966.

A. L. McWilliams.

Subscribed and Sworn to before me this 5th day of January, 1966.

Peggy J. La Barbera, Notary Public.

[fol. 120] State of Illinois,
County of Cook, ss:

Affidavit by Anthony C. Karlos in Opposition to the Federal Trade Commission's Motion for a Preliminary Injunction

Anthony C. Karlos, being first duly sworn, on oath deposes and says that:

1. He is the Chairman of the Board of Grocerland Co-Operative, Inc., with offices at 3636 West 51st Street, Chicago, Illinois. Grocerland is a cooperative owned by independent retail grocers which performs a purchasing and warehousing function for its members.

2. That some member retailers of Grocerland presently purchase their milk supplies from Dean. It is affiant's firm conviction that Dean's acquisition of the dairy operations of Bowman will have no adverse effects on Grocerland or its members. Nor can affiant conceive that the sale to Dean will have any anticompetitive effects on other grocery retailers or on competition in the dairy industry. There is no likelihood that Dean's acquisition of Bowman's dairy operations will give it the market power to charge other than competitive prices for its dairy products. Furthermore, there are many alternative milk suppliers to whom Grocerland and its members could turn should this unlikely event occur.

3. A number of grocery chains have recently entered the dairy business in order to supply the milk needs of their own stores. It is affiant's belief that these large [fol. 121] grocery firms will use the cost savings which may be derived from such vertical integration to reduce the retail prices on the dairy products sold through their stores. If independent grocers such as the members of Grocerland are to remain competitive with such vertically integrated chains, they must be able to purchase their milk from efficient independent dairy companies. Affiant firmly believes that Dean's acquisition from Bowman of its dairy operations will enable Dean to remain competitive in the dairy industry and to supply independent grocers with milk at the lowest possible prices. In view of Dean's plan to resell a substantial part of Bowman's volume to other independent dairies in Chicago, affiant believes that this transaction will also strengthen these smaller firms and better enable them to supply their independent customers.

In Witness Whereof the undersigned has executed this Affidavit this 5 day of January, 1966.

Anthony C. Karlos.

Subscribed and sworn to before me this 5 day of Jan, 1966.

Ernest R. Nassos, Notary Public.

[fol. 122] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

MOTION TO MAINTAIN CONFIDENTIALITY—Filed January 6, 1966

Now come the respondents, Dean Foods Company and Bowman Dairy Company, by their attorneys, and respectfully move that respondents' joint brief and affidavits filed on January 5, 1966, be retained in a confidential file, for the reasons that the detailed factual information and data revealed in the affidavits and summarized in the brief have not previously been disseminated to the general public and are necessarily disclosed in this proceeding for the purpose of demonstrating the lack of any merit or substance in the Federal Trade Commission's position herein; respondents believe that present publication of the detailed facts and statistics revealed in their affidavits and briefs, (particularly to the competitors of respondents) would seriously and adversely affect the businesses of both the respondents. Granting of the relief herein requested could in no way harm or prejudice the petitioner.

[fol. 123] In support of which is submitted the attached affidavit of Hammond E. Chaffetz.

Respectfully submitted, Edward I. Rothschild, L. Edward Hart, John Paul Stevens, Attorneys for Respondent, Bowman Dairy Company.

Hammond E. Chaffetz, Lawrence Gunnels, William R. Jentes, Attorneys for Respondent, Dean Foods Company.

[fol. 124] AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

HAMMOND E. CHAFFETZ, being duly sworn on oath, deposes and says that as attorney for respondent Dean Foods Company he has been advised by the managing officers of both respondents that they believe that present divulging of the facts and data contained in respondents' joint brief and affidavits to the general public and respondents' competitors would cause serious detriment to the respondents' businesses.

Hammond E. Chaffetz.

Subscribed and Sworn to before me this 6th day of January, 1966.

——, ——, Notary Public

[fol. 125] Proof of Service (omitted in printing.)

[fol. 126-136] [File endorsement omitted]

Reply Memorandum for Petitioner—Filed January 6, 1966 (omitted in printing.)

[fol. 137] EXHIBIT I

AFFIDAVIT OF SCOTT A. WALKER

CITY OF WASHINGTON,
District of Columbia, ss:

My name is SCOTT A. WALKER. I am an economist in the Division of Economic Evidence, Bureau of Economics, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C., 20580. My qualifications as an economist and expert on the dairy industry are summarized in my affidavit of December 28, 1965, in which I concluded that the proposed acquisition of Bowman Dairy Company by Dean Foods Company will lessen competition substantially and tend to create a monopoly in the sale and distribution of packaged milk in the Chicago Area.

I have further examined the files of the Federal Trade Commission respecting the Bowman acquisition by Dean, and other data on the dairy industry available in the Commission's files. I have also read the various affidavits contained in the appendix to the joint brief filed by Dean and Bowman in the case of *Federal Trade Commission* v. *Dean Foods Company and Bowman Dairy Company* (Docket No. 15493. As a result of my further study, I have reached four additional conclusions which I believe are relevant to an evaluation of this merger's probable impact on the competition in the Chicago packaged milk market:

[fol. 138] 1. Dean states its belief that it may lose its principal wholesale account in the Chicago Area—Jewel Tea Company, that Jewel is considering backward integration through the construction or purchase of its own packaged milk processing plant. It is asserted, on the basis of the projected possible loss of the Jewel account, that Dean's present 7% market share is not an accurate indicator of its market position or of the impact of the Dean-Bowman merger. Dean, however, has a reputation in the dairy industry of being an extremely able and aggressive competitor, and it is quite unlikely that Dean would stand by idly while such a significant portion of its business in the Chicago Area was being lost. Indeed, if Dean were prevented from acquiring Bowman, and if it were in fact to lose its principal

customer, it is probable that Dean would become a more vigorous competitor—offering better service and perhaps lower prices—in order to offset the possible loss in market share.

2. The affidavit of Mr. Francis H. Kullman, Jr., Chairman of the Board of Bowman Dairy Company, states on p. 6:

> "The larger dairies having home delivery business (such as Borden and Hawthorn Mellody) also enjoy advantages over Bowman. These companies distribute a much larger percentage of their milk on wholesale routes. With this large wholesale volume to fill their plants, they have been able to eliminate their less efficient routes completely and preserve only their high volume, relatively low cost retail routes. Bowman, on the other hand, has had a relatively small percentage [fol. 139] of its volume in the wholesale business. Any attempt to trim its routes as Borden and Hawthorn Mellody have done would mean running the River Forest plant at less than 50 percent capacity with the result that the cost per unit of milk would rise sharply."

I fully agree that a dairy company which has a large wholesale volume is better able to compete in the retail home delivery business. As stated by Mr. Kullman, this permits such a company to operate at a higher percentage of capacity with resulting lower cost per unit of milk.

If Dean were to acquire Bowman, Dean, too, could capitalize on the advantages of a relatively large combined wholesale volume to preserve the more desirable Bowman retail routes. It is unrealistic to argue that no attempt would be made to attain this objective. Accordingly, it is unrealistic to contend that Dean will lose one half of Bowman's market share after the merger.

3. There are only four really significant competitors in the packaged milk business in the Chicago Area. These are Bowman, Borden, Dean, and Hawthorne-Mellody. The remaining firms in this market are for the most part small, locally-owned, and locally-operated businesses. In my opinion, it would be better for competition in the Chicago Area if Bowman were liquidated or its assets sold piecemeal, than to permit one of the other three leading sellers to succeed to Bowman's market position. If Bowman were liquidated,

its 16% market share could reasonably be expected to be [fol. 140] distributed among all of the competitors in the market, thereby reducing the level of concentration in this market and improving the state of competition.

4. Dean points to a decrease in the market shares held by the four largest companies between 1954 and 1961 as being demonstrative of "the competitive vitality of the smaller dairies in the Chicago area". It should be noted, however, that during this same period, the total number of competitors in the Chicago market declined from 107 to 70. By 1965, this number had declined still further, to 57. This reduction in the number of competitors represents a significant increase in over-all concentration, and the four largest still command a formidable share of total sales.

Scott A. Walker.

Subscribed and sworn to before me, a Notary Public in and for the County of Cook, State of Illinois, on this 6th day of January, 1966.

Steve Babyar.

My Commission expires on April 21, 1968.

[fol. 141] Certificate of Service (omitted in printing.)

[fol. 142] [File endorsement omitted.]

[fol. 143] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

FEDERAL TRADE COMMISSION, Petitioner,

vs.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

Transcript of Proceedings—January 6, 1966

had at the hearing of the above-entitled cause in the courtroom of the Seventh Circuit Court of Appeals, United States Court House, Chicago, Illinois, before Hon. ELMER J. SCHNACKENBERG and Hon. LUTHER M. SWYGERT, Judges of said Court, on Thursday, January 6, 1966, commencing at the hour of 2:00 o'clock p.m.

PRESENT:

Mr. James McI. Henderson, Mr. Frederick H. Mayer, Mr. Richard H. Stern and Mr. Peter Bleakley, (Federal Trade Commission, Washington, D.C.)

Messrs. Kirkland, Ellis, Hodson, Chaffetz & Masters, (Prudential Plaza, Chicago, Illinois), by Mr. Hammond E. Chaffetz and Mr. William R. Jentes, appeared for respondent Dean Foods Company, and Messrs. Rothschild, Hart, [fol. 144] Stevens & Barry, (Suite 820, 120 South La Salle Street, Chicago 3, Illinois), by Mr. John Paul Stevens, appeared for respondent Bowman Dairy Company.

[fol. 145] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Schnackenberg: The Court has before it the case of File No. 15,493, Federal Trade Commission against Dean Foods Company and Bowman Dairy Company. This matter is before the Court on various motions and responses.

Are all counsel present and ready to proceed with the motions?

Mr. Chaffetz: Ready, your Honor.

Mr. Henderson: Ready, your Honor.

Judge Schnackenberg: Because of the fact that there are several motions, have counsel any suggestions as to how much time the Court might allow on each side for arguments?

Mr. Henderson: The Government would like forty-five minutes, your Honor, if we may have it.

Judge Schnackenberg: Which side are you representing?

Mr. Henderson: The Federal Trade Commission.

Mr. Chaffetz: Your Honor, we would try to stay within forty-five minutes, but if we needed an hour, we would like to feel we could have it for both Dean Foods and Bowman Dairy combined.

Judge Schnackenberg: Ordinarily, as our rules provide, forty-five minutes is allowed on each side. However, be-
[fol. 146] cause of the situation in this matter, it might be necessary for counsel to have a little more time.

We will use forty-five minutes as the target, but if you run over and do not exceed an hour, you will not be in contempt of court.

Mr. Chaffetz: Thank you, your Honor.

Mr. Henderson: May we have equal time, your Honor?

Judge Schnackenberg: Yes. Certainly.

Mr. Henderson: Thank you, your Honor.

Judge Schnackenberg: There are several matters, all of which will probably be involved in this discussion, but the petition for preliminary injunction is probably the matter that should be discussed first, and from there on you will have to cover the other aspects of the situation in logical order.

Mr. Stern, you may proceed for the petitioner.

Mr. Henderson: Your Honor, before Mr. Stern begins his argument, and he will make the argument for the Federal Trade Commission, I should like to present Mr. Frederick Mayer, who is the Senior Attorney for Merger Mat-
[fol. 147] ters for the Federal Trade Commission.

I have asked him to attend in the event we have any problems that may come up in regard to mergers in which he can assist the Court.

Judge Schnackenberg: You will put him in if the other man is taken out, is that it?

Mr. Henderson: That is right.

Judge Schnackenberg: We are glad to have you here, Mr. Mayer.

Mr. Mayer: Thank you, your Honor.

Judge Schnackenberg: Mr. Stern, you may proceed.

ARGUMENT ON BEHALF OF FEDERAL TRADE COMMISSION BY MR. STERN

Mr. Stern: May it please the Court:

The Federal Trade Commission has brought this case here to test out an important jurisdictional issue arising under the antimerger laws administered by the Commission.

The issue is whether this Court has the power to enter an order protecting its appellate jurisdiction over Federal Trade Commission proceedings.

More specifically, the question is, does this Court have jurisdiction to enter a preliminary injunction against a [fol. 148] merger or to enter some other protective order to prevent the dissipation or destruction of the assets involved, this during the pendency of the administrative proceeding.

With the Court's permission, I will take up our points in this order: the threshold question is jurisdiction, I think, and I think is the major issue to be resolved. There is a conflict of Circuits on this point, as the Court is aware.

Judge Schnackenberg: Jurisdiction of the Commission or the Court?

Mr. Stern: Your Honor, the jurisdiction of the Court. I might say that what we are concerned with throughout these proceedings is the jurisdiction of the Court. We are not asking the Court to protect the jurisdiction of the Commission. We are asking it to protect its own jurisdiction, as I shall attempt to show.

Judge Schnackenberg: By some pleadings filed later in this case, there is some question raised as to the jurisdiction of the Commission, too.

Mr. Stern: I will be glad to respond to that point in addition to the other points.

Judge Schnackenberg: This does not make our problem [fol. 149] any easier.

Mr. Stern: I will treat that as my first point.

Judge Schnackenberg: All right.

Mr. Stern: If I may, may I just list the points I do want to cover.

I will cover the point which your Honor raised first, and then I will go to the jurisdiction of the Court, which is the issue on which there is a conflict of Circuits, and it is, as I said, the threshold issue because only if we are able to convince the Court on this issue does it become necessary to reach any other issue in the case.

Judge Schnackenberg: That is the issue of the jurisdiction of what?

Mr. Stern: The jurisdiction of this Court of Appeals to enter a preliminary injunction or other protective order in the premises.

With respect to the second point, I want to make a single comment on the International Shoe defense, or the so-called failing company defense.

The remaining point, the last point, is our showing that the merger is probably illegal and thus will probably be adjudicated to violate Section 7 of the Clayton Act and [fol. 150] Section 5 of the Federal Trade Commission Act.

This last point is covered at some length in our main brief and in our reply brief.

I have not mentioned one other point and that point is, of course, whether there is a showing of necessity for preliminary relief in this case.

This is a point, however, upon which I do not think there is any serious factual dispute, because petitioner and respondent are agreed that after the merger takes place, the assets in question will disappear. Dean will close down various Bowman plants, it will consolidate Bowman's and Dean's operations and the Bowman assets and working capital will be divorced from the business and distributed elsewhere.

There is, I believe, no factual dispute on this point and I think the parties are agreed that once the merger is completed, it will be virtually impossible to restore the status quo in the sense of restoring Bowman to the Chicago market.

I will now turn to the question raised by Judge Schnackenberg, whether the Commission had any jurisdiction to [fol. 151] act in this case.

The Federal Trade Commission issued a complaint under Section 7 of the Clayton Act and under Section 5 of

the Federal Trade Commission Act, and I have the statutes here with me.

Section 7 is 15 U.S. Code, Section 18, and Section 5 is 15 U.S. Code, Section 45A(1).

There are, in addition to these substantive provisions which define the violations in question, what you might call the empowering provisions which I think are perhaps more in issue than the substantive provisions.

These are the parts of the statute that say the agency shall issue a complaint or is authorized to start a proceeding in such-and-such circumstances.

For example, under the Federal Trade Commission Act, Section 5A(6) provides that, "The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The next portion of the statute is Section 5B which says that, "Whenever the Commission has reason to believe [fol. 152] that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act of practice in commerce and it shall appear to the Commission that a proceeding will be in the public interest, the Commission shall issue and serve a complaint."

There is a similar provision in Section 11 of the Clayton Act, 15 U.S. Code, Section 21, which is Section 11B, which says that, "Whenever the Commission shall have reason to believe that any person is violating or has violated any of the provisions of Section 7, it shall issue a complaint."

Now, our theory under the Clayton Act—I think I will take up our theory under the Clayton Act first, because to some extent our Section 5 theory is derivative of the Clayton Act and takes its content from the Clayton Act, because Section 5 is a very general statute.

Section 5, the Supreme Court has said, minimally registers all violations of the Sherman Act to the Clayton Act. That is the Times-Picayune opinion.

[fol. 153] A similar statement occurs in many other opinions, including Federal Trade Commission against Motion Picture Advertising Service in Volume 344 U.S., and I think it is at about page 395 that this statement occurs.

It is, therefore, recognized that the Federal Trade Com-

mission Act is a very general statute which sweeps up all other antitrust violations and has some additional ambit of its own.

I think in this case, however, we must take guidance from the policy of the Clayton Act in order to determine what it is that the Commission can find to be a Section 5 violation.

Now, under the Clayton Act this acquisition once consummated, assuming that the other elements of a violation are made out, clearly would fall within Section 7. Section 7 covers stock acquisitions, it covers assets acquisitions, it covers a number of other transactions.

I think the objection that has been made by respondent, or respondents, to which Judge Schnackenberg referred, is that the merger has not been fully consummated.

On December 13th, Dean and Bowman entered into a contract with one another. The contract is not to be carried out in full until Monday, that is, legal title to the property will not pass.

We think, however, that it is proper for the Commission to act by issuing its Section 7 complaint before it is, you might say, too late.

I think that the remedial purpose of this statute would be thwarted, if not defeated, if the Commission were powerless to act until a merger were completed, particularly in a case such as this when the very agreement for the merger provides for the immediate dissipation of something like half of the assets of the acquired company. I refer to the cash, the marketable securities, the working capital and the like.

I think we can take comfort from the very language of Section 11, the part of it that says, ". . . when the Commission has reason to believe that any person is violating the provisions of Section 7."

We think that Dean and Bowman are right now in the process of violating Section 7.

Judge Swygert: You think that the contract itself is a [fol. 155] type of violation?

Mr. Stern: Your Honor, my next contention will be that irrespective of our position under the Clayton Act, there is absolutely no doubt that the contract is swept up by the Federal Trade Commission Act, because the Federal Trade Commission Act will sweep up any contract, com-

bination or any other practice which would be an antitrust violation.

I think that an agreement or a combination between these two companies for one of them to be absorbed by the other does fit within the provisions of the Sherman Act which provides that any contract or combination in the form of a trust or otherwise or conspiracy in restraint of trade is declared unlawful.

Since the Federal Trade Commission Act includes everything in the Sherman Act, clearly a contract, a contract in restraint of trade, as we submit, that contract is a Section 5 Federal Trade Commission Act violation.

I would go further, your Honor, and say that the contract is also a Section 7 violation because I do not believe [fol. 156] that it can be said that the violation of Section 7 takes place at only one instant in time, the instant at which legal title to the property is transferred.

I think we may very properly regard a Section 7 violation as a continuing process that takes place over perhaps a short period of time, but not in one instant in time.

Judge Swygert: The same argument could be made on this question whether a complaint was filed by the Commission or by the Attorney General.

Mr. Stern: No, your Honor. I wish I could say "Yes," but the Department of Justice proceeds under a different empowering statute.

Our empowering statute says that when the Commission has reason to believe a person is violating or has violated Section 7, we proceed, whereas the Department of Justice has a much more vague and general statute that says they may prevent and restrain violations.

Nevertheless, I do not think, for the reasons I have given, that there is any significant difference between the jurisdiction of the Federal Trade Commission to issue its complaint and the power of the Antitrust Division to issue [fol. 157] its complaint, in similar circumstances.

I do not know whether I have satisfied the questions which your Honor may have on this point. If there are any other questions on the Commission's jurisdiction or the propriety of its acting at this point in time, I would like the opportunity to respond to those questions now.

Judge Schnackenberg: I do not think you have sufficiently responded as to the authority of the Commission

to come in at this time, before it has entered a cease and desist order, and ask this Court to enter an injunction. You recognize the point I am asking about, do you not?

Mr. Stern: Now, your Honor, I regret to say that I misunderstood the thrust of your Honor's question.

Judge Schnackenberg: You were so eloquent in your answer that I thought perhaps I did not understand what you were saying, but it seemed to me you were entirely beside the point. Now do you understand my question?

Mr. Stern: I do, your Honor, and I regret that I misunderstood it.

Judge Schnackenberg: If you do not have jurisdiction [fol. 158] or authority under law to be here today, we could dispose of all this work rather quickly. That is the matter I think you ought to talk about first. What right does the Commission have to be here? The Attorney General is not here, is he?

Mr. Stern: The Attorney General is not here, your Honor, but the——

Judge Schnackenberg: All right. You understand the point, what I want to hear you talk about.

Mr. Stern: I do, your Honor, and if I may, I would like to respond to the very last comment which you made.

We conferred with the Department of Justice before bringing this case and we discussed with them whether they should appear in this Court to argue to you or whether I should appear in this Court to argue to you.

Judge Schnackenberg: Anything that you and the Attorney General agreed upon would not change the law as to who has the right to be here.

Mr. Stern: It would not, your Honor, but you may regard it——

[fol. 159] Judge Schnackenberg: Have you a right to be here, under the law?

Mr. Stern: Your Honor, I think, with the greatest deference——

Judge Schnackenberg: Talk about that. Talk about that.

Mr. Stern: I will, your Honor. With the greatest respect, your Honor, I think the question is not our right to be here, but your right to act in the premises. The question is——

Judge Schnackenberg: Sensitive as that is, I think you should discuss that, too, but first we want to know whether

the Commission has any right to be here. Is that not correct?

Judge Swygert: That is the point. It is simply a question of standing of the Commission to come in here and ask this Court to invoke its jurisdiction.

You can put it the other way, whether this Court has jurisdiction to entertain a petition by the Commission for preliminary relief.

Mr. Stern: Well, there are several—I am not quite sure that I do fully understand the thrust of the question. Is it whether the right attorneys have come before this Court?

[fol. 160] Judge Schnackenberg: No. You represent the Commission, do you not?

Mr. Stern: I do, your Honor.

Judge Schnackenberg: All right. If you have read the petitions, briefs and motions filed here, you will understand what I am referring to.

The point is made that the Commission has no right to be in here in this proceeding, and authorities have been cited by the opposition to bear that out, and they claim that they fortify their position by citing the instances when the Commission has appeared before Congress on successive occasions and asked Congress to please pass a law so that the Commission has a right to go in and do what you are doing here today for the Commission, and Congress has failed to do so, session after session.

Have I made the position of the Court clear as to what it wants you to talk about?

Mr. Stern: Your Honor, the problem is one of characterization, obviously.

Judge Schnackenberg: No. It is not a matter of characterization. It is a matter of substance here.

[fol. 161] Mr. Stern: Your Honor, I think it can be said that even if we appeared here merely as a friend of the Court——

Judge Schnackenberg: You are not here as a friend of the Court.

Mr. Stern: Your Honor, we are here——

Judge Schnackenberg: The Court does not need any friends today.

Mr. Stern: Your Honor, you may not regard the Federal Trade Commission as a friend of this Court, but nevertheless, the capacity in which the Commission petitioned——

Judge Schnackenberg: We have not severed diplomatic relations, but you represent the Commission here today.

Mr. Stern: And I represent the Commission to ask the Court to issue a writ in aid of its own jurisdiction and to protect its own jurisdiction.

Judge Schnackenberg: All right. Now, where is the Commission's authority to send you in here for that purpose? I am serious about it.

Mr. Stern: Your Honor, there is no specific statutory authority——

Judge Schnackenberg: If you do not have that, that [fol. 163] ends this litigation.

Mr. Stern: Your Honor, there is no specific statutory authority that says the Commission may come to the Court of Appeals under the All Writs statute to ask the Court of Appeals to enter some kind of order in aid of the Court's appellate jurisdiction.

We rely, however, on Section 1651 of Title 28 which says that the Court has the power.

There is nothing in Section 1651, I believe, which states who it is who has standing to ask the Court to enter a writ in the circumstances, and there are many cases in which courts have entered writs of this type at the petition of agencies in order to preserve the status quo during the pendency of an administrative proceeding.

Transamerica, of course, is the case most closely in point, because it was a Section 7 case under the exact same statute and a very similar factual situation to the one at bar.

Judge Schnackenberg: That is a decision of what court?

Mr. Stern: That is a decision of the Court of Appeals for the Ninth Circuit in 1950. That is one of the two [fol. 163] conflicting opinions which the——

Judge Schnackenberg: That is a conflicting opinion?

Mr. Stern: The opinion of the Second Circuit is to the contrary.

Judge Schnackenberg: Well, now, you see, we have a real question here and that is why we want you to talk about it.

What is the law, then? If the court in San Francisco holds one way and the court in New York holds the other, we want to know what the law is, and we want the benefit of the aid you can give us by your argument here today, because obviously, the written motion in opposition by your

opponents reflects just the opposite view to that entertained by you.

Mr. Stern: I think I will not attempt to recapitulate the pre-1950 cases which we have in our main brief.

I think they are covered sufficiently, and I think it is enough to say in respect to those cases that the power of the Federal Courts to issue equitable writs in aid of their appellate jurisdiction has long been recognized.

[fol. 164] I think that the cases also show that it has long been recognized that such writs have been entered to aid appellate jurisdiction over administrative proceedings just as well as proceedings at law, and I think the proper point at which to begin is with the earlier of the two conflicting precedents, the Transamerica decision.

As the Court knows, the Court of Appeals is the exclusive review court for any final order which the Federal Trade Commission can enter here. Section 11C of the Clayton Act so provides.

It says:

> "Any person required by such order of the Commission to cease and desist from any such violation may obtain a review of such order in the Court of Appeals of the United States for any circuit within which such violation occurs or within which such person resides or carries on business. . . ."

It goes on to say what the method of review is and it concludes by saying that to the extent the order of the Commission is affirmed, the Court shall issue its own order commanding obedience to the terms of the order of the [fol. 165] commission or board, and the order of the commission at that point vanishes and the Court enters its own order which, from then on, is the only final order in the circumstances.

Judge Swygert: I hesitate to break in, and I know you want to talk about the Ninth Circuit case, but the respondents make the point that the jurisdiction of the Court of Appeals does not attach until, as the statute says, the petition for review has been filed—I am interpolating—at which time the Court shall have jurisdiction of the proceeding.

Now, up until the filing of the petition for review or

enforcement from the Federal Trade Commission, what authority does this Court have to do anyting until that time?

Mr. Stern: That is the precise——

Judge Swygert: Is that not the prime question here?

Mr. Stern: That was the precise question—first, that was the precise question at issue in Transamerica. There is no doubt that this Court has no appellate jurisdiction over a Federal Trade Commission order until it is a final Federal [fol. 166] Trade Commission order, that is, until the agency has concluded its administrative proceeding and, let us say, told the respondent to divest itself of the unlawfully acquired property.

The jurisdiction of this Court that we are concerned about is its potential appellate jurisdiction, and I believe that I can say with confidence that the cases recognize potential appellate jurisdiction as well as actual, present appellate jurisdiction as a ground for relief under Section 1651.

In fact, just about every mandamus case this Court has ever had has been in aid of its potential appellate jurisdiction, because there has been no final order. The whole purpose of mandamus, for example, is to prevent an egregious error from being committed in the lower court which will impair or in some way make defective this Court's exercise of its appellate jurisdiction over the final order entered in the case.

I think, therefore, that there is no way in which our position is weakened by the fact that this Court's jurisdiction to review the Commission's as yet unissued order, has not [fol. 167] yet attached.

We are asking this Court to issue a writ in aid of the jurisdiction which it will subsequently acquire at some later stage in this proceeding which, in fact, I must concede, may never happen, but nevertheless may very likely and is quite likely to happen and is sufficiently likely to happen that this Court has a proper interest in protecting that jurisdiction.

One of the leading cases in the Supreme Court is McClelland against Carland, which involved, as I recall, precisely this kind of situation.

In that case there was a mandamus to dissolve a stay. A lower court, I think it was a circuit court of the United States, had entered a stay of its own proceeding while a

collateral state proceeding went on. If the state proceeding were allowed to go to judgment first, it would act as a res adjudicata and that would mean that there would be no final judgment in the circuit court of the United States and therefore there would be no appellate jurisdiction that would ever attach in the circumstances, since it was in error [fol. 168] or since it appeared that it might well be in error to have the circuit court enter a stay in such circumstances, and the Supreme Court said that a show-cause order should be issued to the circuit court to show why it should not dissolve its stay. I think there is no doubt whatsover——

Judge Schnackenberg: In that case was there a petition for mandamus pending in the Circuit Court of Appeals?

Mr. Stern: Your Honor, that was under the old system, where we had the circuit courts, not the Circuit Courts of Appeals, but that was a case which would go, as I recall, directly from the circuit court to the Supreme Court. This was a pre-1911 situation.

Judge Schnackenberg: You did not have there a court of review, then, did you?

Mr. Stern: The Supreme Court was the court of review for the circuit court. The circuit court was the trial court in that case.

Judge Schnackenberg: You did not have a Court of Appeals in that situation, did you?

Mr. Stern: You had the Supreme Court, your Honor, [fol. 169] and the precise same statute was involved, Section 1651.

Judge Schnackenberg: Did the Supreme Court have a petition for mandamus before it?

Mr. Stern: Yes. That was the posture of the case.

Judge Schnackenberg: In this case we have nothing before us here.

Mr. Stern: You have the petition.

Judge Schnackenberg: What is the excuse for coming in here?

Mr. Stern: Your Honor, you have before you precisely what the Supreme Court had before it, a petition for a writ under the all writs statute.

Judge Schnackenberg: You say they had a petition for mandamus before them?

Mr. Stern: Your Honor, mandamus is one of the prerogative writs.

Judge Schnackenberg: Yes. I know that. We have those here frequently. In aid of our jurisdiction in such proceedings we have certain powers, as you say, but at this moment, when you came in with this petition, or whatever your pleading is called here, your request for an injunction, [fol. 170] up to that time we had nothing about this case in this court, is that not true?

Mr. Stern: Yes, your Honor, that is true, and——

Judge Schnackenberg: Now, in spite of the fact that you needed some help and Congress would never give to the Commission any authority to file proceedings of this kind, you come in here and ask this court to intercede without any precedents to support you except in one case in the—what was that, the Tenth Circuit or the Ninth Circuit?

Mr. Stern: That was the Ninth Circuit, your Honor.

Judge Schnackenberg: The Ninth Circuit.

Mr. Stern: Yes.

Judge Schnackenberg: The only other case on the subject is the Second Circuit case, the Second Circuit being in New York City, which is a very prominent place in this country, and they disagreed with the San Francisco court, is that not correct?

Mr. Stern: They did, your Honor. They made no attempt to distinguish the opinion. They said flatly, "It is wrong. We disagree with our brethren of the Ninth Circuit. [fol. 171] They have a mistaken view of the law."

Judge Schnackenberg: Is there anything in the wording of the law, the Act which creates the Federal Trade Comission, which expressly grants power for this proceeding?

Mr. Stern: Your Honor, there is no specific statutory authority except the general authority that all persons have to come before the courts of the United States for prerogative writs.

Judge Schnackenberg: Does it say that in the Federal Trade Commission Act, what you have just quoted?

Mr. Stern: There is no specific statutory authority, your Honor.

Judge Schnackenberg: However, the Federal Trade Commission Act does have provisions for coming to a Court of Appeals in certain situations. It says so, does it not?

Mr. Stern: The very section——

Judge Schnackenberg: Do you agree with me on that?

Mr. Stern: The very section which I was quoting before, yes, your Honor.

[fol. 172] Judge Schnackenberg: And those are cases where somebody is aggrieved by an order entered by the Commission and desires a petition for review in this court, is that not true?

Mr. Stern: Yes, your Honor. That is correct. That is correct. If I may——

Judge Schnackenberg: In other words, Congress did not grant the extension of powers which you are asking this Court to grant today, did it?

Mr. Stern: Congress has not spoken on the subject.

Judge Schnackenberg: Has it been asked to at several sessions?

Mr. Stern: Your Honor, I must admit that the Commission has, on a number of occasions, requested Congress to pass statutes that relate to this.

The Court: If you are right in your contention and we have the power anyway, why did the Commission go to Congress several times to get a law passed authorizing the proceedings?

Mr. Stern: The only thing I can say to your Honor is that the Commission acted either out of an excess of caution or it was not properly advised.

[fol. 173] It is now the position of the Commission that this Court has the power to act as the Commission has asked Congress to act.

Judge Schnackenberg: You may be right, but it certainly is a change in the policy of the Commission, is it not?

Mr. Stern: Your Honor, we had the precise same thing with Section 7 of the Clayton Act.

Judge Schnackenberg: Is that not true?

Mr. Stern: You are absolutely right. I cannot disagree one iota with you, your Honor.

Judge Schnackenberg: Then say so.

Mr. Stern: You are absolutely correct.

Judge Schnackenberg: All right. You may be right. Go ahead.

Mr. Stern: We had the same situation with respect to Section 7 of the Clayton Act. The Federal Trade Commission——

Judge Schnackenberg: You are watching your time, are you?

Mr. Stern: The Federal Trade Commission——

Judge Schnackenberg: I do not want you to forget anything by a shortage of time. You have used twenty-nine minutes, so keep that in mind.

[fol. 174] Mr. Stern: Thank you, your Honor.

Judge Schnackenberg: Go ahead.

Mr. Stern: The Federal Trade Commission repeatedly asked Congress to amend Section 7 for it to cover vertical integration. Over a period of years it kept telling Congress that Section 7 would not reach vertical acquisitions.

Finally, Congress passed a statute. In the meantime, however, a case under old Section 7 came to the Supreme Court and the Supreme Court said that the Commission had just misread the statute for the past forty years, or however many years it had been, that the Commission and the courts had always had the power to move against vertical integration under Section 7 of the Clayton Act, and the Supreme Court discusses this in the du Pont opinion.

It said, "Yes, we know the Commission asked for this, we know they said they did not have the power, but they were wrong. We know how to interpret the statute and the Commission does not."

I submit to you, your Honor, that you are in the same posture as the Supreme Court in this respect and we [fol. 175] request that you interpret the statute as we urge it, despite the fact that the Commission has told Congress the contrary on some occasions.

I might add that most of the statutes involved have been a request that the agency itself should be permitted to enter a temporary cease and desist order. This is not the case with respect to all of the bills that were proposed, but with respect to most of them, it was the case where the Commission did not want to go to Court, but wanted to issue its own injunction.

I think your Honor will see that Congress may have had reasons for not wanting to accede to that request of the Commission.

The Transamerica case does not stand alone. As your Honor said before, the Transamerica and International Paper cases are the only cases that there are on this point.

Transamerica in the last two or three years twice has been cited by the Supreme Court in a context which I think is relevant here. The first case is the Arrow Transportation case, which is discussed in our main brief at page 30.

[fol. 176] That was the case in which the Interstate Commerce Commission had instituted a rate investigation of certain railroad tariffs. The Commission had the power to stay the rate for seven months, but no more.

The reason that it had a seven-months power was that there had been considerable dispute in Congress as to what should be done about the stays. Shippers wanted longer than seven months and carriers wanted shorter stays or no stays at all. As a compromise Congress authorized the Interstate Commerce Commission to make seven-month stays of rate proceedings.

The Supreme Court held that in the circumstances, the All Writs statute could not be used to defeat the clear intent of Congress to have a seven-months stay and to have the matter handled by the Commission and not by the Courts, but in holding this, the Court expressly stated in the passage which we quote on page 31:

> "We in no way reflect on all writs cases, such as Transamerica. We in no way reflect upon decisions which have recognized a limited judicial power to pre-[fol. 177] serve the court's jurisdiction or maintain the status quo by injunction."

I think the Transamerica case is, at the very least, approved by the Supreme Court in its Arrow opinion. I think it shows that Transamerica is regarded as a valid and proper precedent.

There is another case recently, the Whitney Bank case, in which the Supreme Court referred to——

Judge Schnackenberg: What is the name of the case?

Mr. Stern: The name of the case is Whitney National Bank against Bank of New Orleans, 379 U.S. 411. The other case to which I referred was Arrow Transportation Company against Southern Railroad, 372 U.S. 658.

Whitney was a case involving a stay of agency action. The agency was going to permit a bank to go into business in competition with a complaining bank who filed a petition and sought some sort of relief to prevent the agency from allowing a competitive bank to go into competition with it.

The court said that in the circumstances it was proper [fol. 178] for the Court of Appeals to issue a temporary

injunction under the All Writs act against the agency and against the people involved so that the question would not be in any way mooted or the subsequent appellate jurisdiction of the Court of Appeals to review the banking agency's action would not be impaired in any way.

Judge Swygert: Was this an agency—excuse me for interrupting.

Mr. Stern: That is all right, your Honor.

Judge Swygert: Was this an agency request?

Mr. Stern: The agency was on the receiving end in this case. The agency was being enjoined from proceeding.

Judge Swygert: By a private party?

Mr. Stern: I have not put that precisely correctly. Originally one party tried a straight equity action against the other party and the Controller of Currency. It got up to the Supreme Court in the regular way and they said, "No, you have picked the wrong route. The proper route is for you to have sought the All Writs route," so the Court did not have the case before it in the precise form in which I have put it.

[fol. 179] What it said was, "Go sue the agency under the All Writs act," but I think for our purposes, your Honor, it is just the same as if they had sued the agency and the Supreme Court had said, "Yes, that is the right thing for you to do."

I think that both of these cases show that Transamerica is a valid precedent of continuing vitality and represents the better view as recognized by the Supreme Court.

The International Paper opinion, which is the case against us, takes the position that there is to be implied from the existence of Sections 15 and 16 of the Clayton Act, which say that private parties and the Antitrust Division can go into district courts to get injunctions, they say that there should be implied from this a conscious withholding of judicial power of the sort we are asking this court to exercise, judicial power under the All Writs act.

There is nothing in the legislative history of the Clayton Act which supports the interpretation of the Second Circuit that Congress consciously withheld and repealed the [fol. 180] historic self-protective powers of the Federal Courts under the All Writs act.

In fact, if anything should be inferred from the legislative history, it would be the contrary, because Congress

said repeatedly in the debates and in the reports on the Clayton Act that they wanted to catch restraints of trade in their incipiency, they wanted to catch monopoly in its incipiency, they did not want to wait until merger after merger brought some particular industry to a state of monopoly or near-monopoly.

To say that Congress wanted to have an incipency statute, a statute which would catch restraints of trade in their incipiency, and at the same time say, "Wait until it is too late. Courts, don't do anything. Wait until after it is too late to enter any relief before you can act," just does not make sense, we submit.

Judge Swygert: Do you see any difference between this Section 7 proceeding and a proceeding under Section 5, where you can come into the Court of Appeals and get relief before investigating an alleged unfair practice violation?

Mr. Stern: Is the thrust of your Honor's question——
[fol. 181] Judge Swygert: I mean, an alleged violation under Section 5.

Mr. Stern: I think the answer is no, but if I may, I wish to—the answer is no, we cannot do that, I think, but I want to make sure that I understand the question.

Judge Swygert: Well, are you asking that this kind of relief be confined to Section 7?

Mr. Stern: I am not asking that it should be confined to Section 7, but I must say that how it can be applied to any other violation of the antitrust laws, at least at the moment, escapes me.

We have to show, I believe, in order to prevail under the All Writs act, several things. We have to show that there is going to be some kind of irreparable public harm in the sense that we will not be able to restore the status quo, or to put it differently, that the court will not be able to enter an order restoring the status quo.

Now, you do not have destruction of assets or destruction of companies in deceptive practices cases. At least, [fol. 182] I have never heard of such a thing. As a general rule, you do not have it in anything except a Section 7 case.

I suppose there might be an extraordinary case where this would be so and perhaps that would be an appropriate case, but I cannot imagine such a case.

The second problem is that we would have to show a likelihood of success on the merits. I do not think that we can come in here without some showing of probable success on the merits.

Now, the law of Section 7, at least in horizontal mergers, has been very well articulated by the Supreme Court in the last few years. It is possible at this time, now, to say that there is such a thing as a Section 7 prima facie case.

Philadelphia Bank says what is one kind of prima facie case. That was 30 per cent horizontal. Just last term or the term before, in Continental Can the Supreme Court whittled the percentage down to 25 per cent, saying that there is a prima facie case of violation when you have a horizontal merger covering 25 per cent of the market. [fol. 183] Now, how we could make out a prima facie case in a deceptive practices situation, I cannot at the moment imagine. I do not think that we are prepared to unleash or that we are asking the Court to open flood gates of litigation upon itself.

Not only would the Federal Trade Commission exercise rational self-restraint, but I cannot imagine that there is any substantial class of cases, perhaps beyond horizontal merger cases, but certainly beyond Section 7 cases, in which this is likely to happen. Does that answer your Honor's question?

Judge Swygert: Yes.

Mr. Stern: If I may, I would like to return to the International Paper decision. The Second Circuit, as I said, in some manner reasoned that there was an implied repeal of judicial power. The Supreme Court has said in these circumstances that the presumption is the other way.

In the Scripps-Howard case, on which I think we can rely heavily, 316 U.S. page 4, Scripps-Howard against the [fol. 184] FCC, that was a case in which the FCC was going to issue a license to the competitor of the person who brought the case. He did not want this competitor to go into business against him pending administrative review.

He went to the Court of Appeals and said, "Would you issue a stay order under your powers, your equitable powers, to prevent the Commission's order from becoming effective and my competitor from going into business against me?"

The Court said, "We have no power to do that. We can't do it."

The Supreme Court said this is absolutely wrong. They said:

> "There is a presumption that courts have this power, this staying power to preserve the status quo, and if Congress wants to take the power away from the courts it should say so with apt words."

This particular discussion is at page 17.

Judge Schnackenberg: That is in the Scripps-Howard case?

[fol. 185] Mr. Stern: That is in the Scripps-Howard case. There is certainly no use of apt words here. There is no use of words at all. The entire repeal is an implied repeal and we are dealing in an area of law where repeals by implication have repeatedly been held by the Supreme Court to be disfavored.

Most recently, in the Philadelphia Bank case, the Supreme Court said, "Repeals by implication in antitrust cases are highly disfavored," citing a very long string of cases to this effect.

I think those are the points which I wish to cover on jurisdiction. I have not recited what happened in Transamerica. I have not recited the facts of that case, but I believe the Court is sufficiently familiar with it from our discussion of that matter.

Judge Swygert: I would like to ask a couple of questions [fol. 186] that were not in the briefs. Does the filing of the petition by the Federal Trade Commission mean that the Department of Justice will not take jurisdiction under these circumstances?

Mr. Stern: No. What happened in this case was—I will be glad to furnish it to the Court. We have a letter from the Attorney General directing us to go ahead and do this.

We first went to the Attorney General and said, "Would you like to come in here and argue this case for us?"?

Judge Swygert: I am not talking about arguing the case. I am talking about bringing the action.

Mr. Stern: You mean, turn the case over in its entirety to the Department of Justice?

Judge Swygert: Yes.

Mr. Stern: If your Honor please ——

Judge Swygert: In other words, once you take jurisdiction, does the Department of Justice withhold its hand?

Mr. Stern: Yes. There is long-standing arrangement [fol. 187] between the Department of Justice and the Federal Trade Commission in merger cases particularly, but in other cases as well, namely, that there are certain areas which one agency will handle and certain areas which the other will handle.

For example, milk is considered to be the particular expertise of the Federal Trade Commission because it has entered so many milk merger orders, it has had so many milk proceedings.

By the same token, heavy machinery cases are customarily brought by the Anti-Trust Division, and oil cases. A cement case or a department store case would be brought by the Federal Trade Commission.

We have an informal arrangement whereby we have allocated markets to one another, you might say.

Judge Schnackenberg: Who handles baseball?

Mr. Stern: I would like to know. We do not. I know that we do not. They handle baseball chewing gum picture cards.

Judge Schnackenberg: Do you want to save any time for rebuttal?

Mr. Stern: I will save——

[fol. 188] Judge Schnackenberg: I would like to get the last word with you.

Mr. Stern: I would like to have the last word, your Honor, and if I may, I would cover only one more point and then sit down.

Judge Schnackenberg: Very well. Go ahead.

Mr. Stern: Now, the one more point I want to cover is the contention which respondents have made in their answering brief at pages 19 through 22. This is on the failing company defense, the doctrine of the International Shoe case.

They make the contention that there is no requirement under this doctrine that the acquired company have no available alternative purchaser. They say it is merely—I do not think they even believe that the company has to be failing. I think they believe that it has to be merely in distressed circumstances, but we have briefed that adequately in our main brief.

They would go further and say that it need not be established by the defendant that he sold out to a company, which was the only company which would buy him. Now, [fol. 189] this is argued with great earnestness.

It is our position that this is absolutely contrary to the ruling of the Supreme Court in the International Shoe case. Respondents cite a number of cases. They cite Beegle against Thomson in this court, for example, which is a long case and which deals with many other points, and then very close to the end mentions in passing that, "It is also the case that when a failing company is acquired, this does not violate Section 7 of the Clayton Act."

There is no reason to believe that the question was in any way presented to the 7th Circuit at that time that there must or must not be an available alternative purchaser. I do not think this Circuit should regard itself as committed to that view, because of Beegle against Thomson.

I think this should be particularly the case, because in all the cases cited by respondent, which I think in general are fairly peripheral, they are cases on temporary injunc- [fol. 190] tion, one of them is under another statute, under Section 408 of the Federal Aviation Act, which says that you should not have mergers which will actually create a monopoly, and the very case cited says that the statute deals not with an acquisition which may substantially lessen competition or may tend to create a monopoly, but one which actually creates a monopoly.

In that case the CAB said, "We don't need to talk about International Shoe"—or rather, the Court of Appeals in reviewing the CAB said, "We need not talk about International Shoe."

That is quite right, but that statute has nothing to do with Section 7 of the Clayton Act.

The one case in this long list of cases which is omitted is the only Supreme Court case on failing company since International Shoe.

I do not know why it is omitted, but I would like to draw to the attention of the Court the Supreme Court's language in that decision, which I think compels the conclusion that there must be no available alternative purchaser for [fol. 191] the defense to be applicable.

United States against Diebold, Incorporated, is in 369 U.S.

Judge Schnackenberg: U.S. versus what?

Mr. Stern: Diebold, D-i-e-b-o-l-d, 369 U.S., 654, your Honor. The passage to which I refer is at page 655, your Honor. It is a very short per curim opinion, your Honor.

This was a case in which summary judgment on failing company had been granted against the government and the government appealed to the Supreme Court. The Supreme Court said:

> "In determining that the acquisition ..... was not a violation of Section 7, the District Court acted upon its findings that 'HHM was hopelessly insolvent and faced with imminent receivership' and that 'Diebold was the only bonafide prospective purchaser for HHM's business.' The latter finding", meaning the only available purchaser, "represents at least in part the resolution of a head-on factual controversy as revealed by [fol. 192] the materials before the District Court of whether other offers for HHM's assets or business were actually made. . . . . On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of International Shoe Company v. Federal Trade Commission, it was improper for the District Court . . . . .", to grant summary judgment.

In other words, the Supreme Court sent the case back to the District Court for an evidentiary trial on whether there was another available purchaser. Now, surely the Supreme Court could not have sent this case back for trial on the [fol. 193] issue if it is not one of the elements of the defense.

I will reserve my remaining time, your Honor.

Judge Swygert: I have one further question, although I do not know whether you are prepared to answer it or not. Assuming you filed your complaint, how long would you say it would take to reach the point where the Commission would finally issue an order one way or another in this case?

Mr. Stern: I am very glad you asked that question, your Honor, because I asked the Chairman of the Federal Trade Commission what I should say to you if you asked that question, because I did not want to answer that on my own responsibility.

The Chairman told me to explain to you how our procedure for the trial of this case worked. We have already issued the complaint and a hearing date has been set. This hearing date is set up in the complaint itself, which you have as Appendix A to our petition. It is some time next month.

[fol. 194] Under our procedure, we give the respondent a reasonable amount of time to prepare its defense. We will give Dean and Bowman as much time within reason as they need to adequately prepare to go to trial. We are already prepared to go to trial.

It is my opinion that it will take us, to try the case, at most, two weeks. Let us assume that it takes them another two weeks or three weeks. It cannot possibly take more than six weeks to try the whole case. I suppose we should allow some time for pre-trial also.

The examiner under our rules may take as long as 90 days to write his opinion, or longer, at least without a special order from the Commission so permitting.

The case would then go to the Commission. They would be allowed 60 days to prepare their appeal brief to the Commission after the examiner enters an order, assuming it is an order adverse to them.

Then as complaint counsel, I would prepare our answering brief. I would be given, I believe, 30 days and they could prepare a reply brief if they wanted, and we would [fol. 195] then argue the case and the Commission would decide it.

The chairman said that we should represent to you that we stand ready, if the Court will enter an order in the premises, every three months to come back to the Court and make a progress report on how fast are proceeding and whether there has been any delay, and if you find that the Commission is dragging its feet in any way, you could then take our order away from us. He said he thought we could have this case back before you within a year.

Judge Swygert: One other question. What about anything less than an injunction, that is, an asset separation

or some other kind of order other than just a blanket stay of the execution of the contract?

Mr. Stern: We have obliquely urged that upon the Court repeatedly in our papers, as I am sure you are aware from your question.

Indeed, I think the Court would be aware of that from the very caption of our petition. I am prepared to say that the Commission desires to see the Court protect the [fol. 196] status quo in aid of the Court's jurisdiction. If this status quo can be adequately protected by a protective order, and I think that it could, the Commission ——

Judge Swygert: Short of what you are asking?

Mr. Stern: Yes.

Judge Swygert: Short of a blanket injunction?

Mr. Stern: Yes. In fact, there are a number of such orders, a number of ways to draft such an order. In the Northern District of Indiana, for example, a very well drawn protective order was recent entered. It is a fairly complex order.

For a much simpler order, you can take, if I may be specific, your Honor, our Exhibit H, I think it is, our proposed temporary injunction, and just strike out of it the language on page 6 of Exhibit G, our proposed preliminary injunction, just strike out of it that phrase which enjoins them so that it reads, "respondents Dean and Bowman are enjoined from . . . ", and then strike out these words, [fol. 197] "taking any further steps to consummate the purchase agreement", strike that out and just enjoin them from making any changes directly or indirectly with respect to the stock, corporate structure, business, and I suppose the word "assets" should be included so that they would not dissipate the company's assets, and I think that would be a perfectly effective protective order in the premises.

I think it might be well, if the Court is minded to do this, to direct that the parties negotiate such an order, and I will be ready to negotiate such an order at any time with counsel for respondents.

Thank you, your Honors.

Judge Schnackenberg: We have two speakers for the respondents, Mr. Chaffetz and Mr. Stevens.

Mr. Chaffetz: I will take most of the time, your Honor, and Mr. Stevens may wish to add something. I will endeavor to speak for both respondents.

Judge Schnackenberg: All right. You may proceed.

[fol. 198] ARGUMENT ON BEHALF OF RESPONDENTS
BY MR. CHAFFETZ

Mr. Chaffetz: May it please your Honors: if there is anything that is certain here today, it is that there will be no Federal Trade Commission hearings. This transaction cannot survive the hearing today. If it is stayed, that is the end of the transaction.

Judge Swygert: I am sorry to interrupt, but would that be true even under a less stringent order?

Mr. Chaffetz: Yes, your Honor, and I am going to tell why.

Judge Swygert: I see.

Mr. Chaffetz: I am going to tell why. This, to all intents and purposes is the final hearing, because if the transaction is stayed, Dean will be compelled to withdraw, as it has the right to do under the contract. The contract so specifically provides.

This is not a matter of putting any pressure on the Commission, and certainly not on the Court. This is a question of the realities of a situation here, and I am going to dwell on that at some length. I want to tell this court what——

[fol. 199] Judge Schnackenberg: You represent Dean?

Mr. Chaffetz: Dean Foods, yes, sir, and as I say, I shall speak for both companies, but I want you to know at the beginning that that is what I am going to talk about. I am going to explain to you why this is the final hearing.

Secondly, I am going to suggest to your Honors, that even though I think there is utterly no jurisdiction here, I think there is no question about it, I suggest to your Honors that you do not have to wrestle with this legal question in any event.

This is an appeal to the discretion of the court, and what I say is that even if there is doubt about the jurisdiction and it is not as clear as I think it is, under the facts of this case, under the facts of this case, considering the consequences to the parties and considering the fact that an adverse ruling by this court will preclude the transaction finally, as though it were a final hearing, even though only an affidavits, under those circumstances, I am going to say that the Court should exercise its discretion [fol. 200] to deny the relief without finally passing on the legal questions that are presented, particularly since, as

I am going to urge, the denial of relief here may very well be in the public interest, not only the parties here, but others in the industry may be better off if this relief is denied, and I am going to talk about the witnesses whose affidavits we have gotten in the last few days, who support that conclusion.

Let me say that we filed a joint brief for the two companies and a number of affidavits. We have affidavits not only from the parties in interest but also from others in the industry, leaders of the industry, the Milk Association, the co-ops, the Dealers' Association, stating that they would not want to interfere with this transaction and that this transaction will hurt nobody in the industry.

I think it is only fair to say, and I think the Court will assume, that the Commission has exhausted its efforts to get similar affidavits and they came up with only one, which I will talk about later.

[fol. 201] As far as the industry is concerned, before this court today, there is no harm to anybody from this transaction, and the harm to the respondents, both of them, if this injunction would be granted, is utterly irreparable and that is, as I say, what I am going to talk about.

Judge Swygert: I appreciate the fact that you are going to talk about that and it is of prime importance, but if we deny it on that basis, then we assume jurisdiction, and how can we assume jurisdiction denying or granting unless we have that jurisdiction?

Mr. Chaffetz: I would think, your Honor, if there is a doubt as to jurisdiction, then in exercising your discretion, you would decline to entertain application for injunction. It is purely discretionary, as the Commission itself says.

Judge Swygert: We either have or do not have jurisdiction.

Mr. Chaffetz: Yes. I think the doubt as to jurisdiction might be a very good ground for refusing to entertain the petition, or go into the merits of it.

[fol. 202] Judge Swygert: Or go into the merits.

Mr. Chaffetz. Or go into the merits. That is right.

[fol. 203] But as I say, I am going to argue the merits, because I think my strongest case is on the merits, even though I think the law is also clear on my side. We have a strong case. I want to tell you about that. First I want to—

Judge Schnackenberg: You are not going to argue whether we have jurisdiction?

Mr. Chaffetz: I am going to argue both, yes, your Honor.

Judge Schnackenberg: If we do not have jurisdiction, you can write your other argument and mail it in.

Mr. Chaffetz: I do not believe you have jurisdiction. In that connection, your Honor, may I interrupt myself to trouble you to note a couple of citations which turned up after we had filed our briefs, which bear on this subject of jurisdiction, incidentally.

In the Philadelphia Bank case, 374 U.S. 321, at page 339, there is a note 17 which, curiously enough, cites both the International Paper case and the Transamerica case, the two cases which counsel says are in conflict on the question of this Court's jurisdiction.

[fol. 204] If your Honors should read that note the way I did, you may conclude that the Supreme Court, Mr. Justice Brennan writing the opinion in that case, believes that both cases may stand up, but the circumstances are different—we suggest the distinction in our brief—and the decision in the Second Circuit, which is precisely on all fours with ours here, is cited in that note in that case.

I also would like to invite your Honor's attention to this citation, Section 1, 73 Stat., 243, Federal Statutes.

Judge Schnackenberg: 73 Stat.?

Mr. Chaffetz: 73 Stat. 243.

Judge Schnackenberg: Yes.

Mr. Chaffetz: The significance of that citation is this: This was an amendment to the Clayton Act, Section 11. This has not been mentioned in the Commission's brief, and I am frank to say that I did not know about this until this noontime.

I was curious about the language in that section and I went back to see what the history of the language was. It [fol. 205] develops that in 1959 Congress amended Section 11C, the statute that is before your Honors today, so that it now reads:

> "Upon such filing of the petition", filing the petition for review in this court, "the Court shall have jurisdiction of the proceeding and the questions determined therein concurrently with the commission or board until the filing of the record and shall have the power to make and enter a decree affirming, modifying or setting

aside the order of the commission or board", and this was the amending language, this language was added, and I quote, "and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

Now, this was a specific amendment by Congress in 1959 which gave the limited jurisdiction to this Court in these premises, and the sentence begins, "Upon such filing of the [fol. 206] petition", the court shall have this jurisdiction.

Judge Swygert: With respect to that section, the history of it, I thought that the history of it was that up until that time the Commission had to start almost a new proceeding, and now it does not.

Mr. Chaffetz: That is true, but while amending the statute for the purpose your Honor indicated—I am sorry to have interrupted you.

Judge Swygert: That is all right.

Mr. Chaffetz: While amending the statute for the purpose your Honor indicated, they added authority in the court to grant equitable relief only after jurisdiction has attached in this Court, only after the filing of the record.

It seems to me that what Congress says is that after the filing of the record, this Court shall have the authority to grant the kind of relief that is sought here.

This statute was only enacted in 1959. It is hard to believe that the Court had much broader jurisdiction than that to begin with.

While I am asking you to make notes, your Honors, [fol. 207] there is an unfortunate typographical error in our brief on page 40, at the bottom of the page. There should have been a negative in the last sentence on that page. The sentence should read:

> "Provisions involved there granted no authority to private parties."

The word "no" should be added after the word "granted" in the third to the last line, in the foot note on page 40 of our brief.

Judge Schnackenberg: The third line from the bottom?

Mr. Chaffetz: Yes. It should read "granted no authority." The word "no" should be added.

Judge Schnackenberg: Very well.

Mr. Chaffetz: I want to bring out one other matter, if your Honors please. There has been no effort here, I want to be sure your Honors understand, for us to make an end-run play around the Commission

This did not just come to the Commission's attention at the last moment when the agreement was signed. The fact of the matter is that we brought this transaction to the attention of the Commission before there was an agree-
[fol. 208] ment. From the moment there was a shake of the hands and an expectation that there would be an agreement, but no assurance that there would be, in order to give the Commission a full opportunity to——

Judge Schnackenberg: Is this in the record before us?

Mr. Craffetz: No, but it is not disputed I am sure, your Honor. Counsel, I am sure, will affirm this.

Judge Schnackenberg: Well, we do not have any way of finding out if it is disputed. I think you should stay on the record.

Mr. Chaffetz: Very well, your Honor. I was afraid, and I did not think of this, this did not occur to me until I read the papers here, that in this posture it might look as though a preliminary injuncton was asked for the moment that the Commission heard about the transaction.

I think it is only fair to point out, and I am sure that the Commission would not object, that this has been before them since the 2nd of November. That is all I intend to say.

Judge Schnackenberg: Well, you should not go outside of the record.

[fol. 209] Mr. Chaffetz: All right. I am sorry. This is an unusual proceeding. I would not do this, your Honor, if a record had been made.

Judge Schnackenberg: It is not unusual in this Court that no lawyer should go outside of the record.

Mr. Chaffetz: I am sorry. In an application for temporary injunction—

Judge Schnackenberg: We have to treat them all the same in this Court.

Mr. Chaffetz: This is the type of preceeding that comes up suddenly and no record is made. There is no record.

Judge Schnackenberg: You still cannot go outside of the record.

Mr. Chaffetz: May I ask your Honor's permission to submit an additional affidavit supplementing the record with these facts? I think they may be of some significance to your Honors.

Judge Schnackenberg: Has the Commission any objection to the statement of counsel, which I believe was outside of the record?

Mr. Stern: Your Honor, I think we will submit an affidavit controverting that statement.

[fol. 210] Mr. Chaffetz: Do I understand that the Commission will submit a——

Judge Schnackenberg: Just a minute. What did you say?

Mr. Stern: I think, your Honor, that we may submit an affidavit to some degree controverting that statement.

Judge Schnackenberg: We will have to have a full-blown trial here to find out who is telling the truth with respect to this.

Mr. Chaffetz: All I know is, your Honor, that I was there on November 2nd in Washington, and I can make my own affidavit.

Judge Schnackenberg: I do not think we had better get off on any collateral trials. This is a problem by itself here.

Mr. Chaffetz: I will confine myself to the facts, your Honor. Let me come to the facts.

Judge Swygert: The case certainly does not turn on that, does it?

Mr. Chaffetz: No. I just did not want the Court to have the impression that the Commission did not have a full opportunity to investigate this matter and learn the facts.

[fol. 211] That is all I had in mind.

Now, let me come to the facts. I would like this to be determined upon the facts, because I think they are clear. I think they are clear.

The thing that puzzles me about the Commission's presentation is the utter unreality of their whole statement and analysis of the facts in their economic affidavits. They postulate a case where two giants, competing with each other, strong, viable competitiors, will continue to compete, will continue to go along, if this transaction is set aside, and their argument on the law relates to that kind of a

transaction. Is the percentage of 23 per cent almost as good as 29 per cent, which the Supreme Court said is enough to constitute a violation of Section 7?

That is not this case at all. Let me talk first about Dean and then about Bowman. I am going to talk primarily about Chicago because the Commission concentrates on Chicago. This case turns, I think, on the situation in Chicago, so for simplicity, I will confine myself to Chicago. [fol. 212] Dean Foods is said to have around 7 per cent of the market here in Chicago. If you analyze that, you will find that most of Dean's business in Chicago is with one customer, the Jewel Tea Company. Dean has never been a traditional household supplier of milk. It never had any retail routes.

It came into the market as a wholesale supplier and principally to supply Jewel Tea. Some time ago, according to the affidavits, Jewel Tea apprised Dean that they were thinking of doing their own milk business and they wanted Dean to be put on notice that they could not depend upon this busines for the future.

The consequences of this to Dean are not merely the loss of the bulk of their business in Chicago, but the effect upon the Dean plants which are big plants which supply milk not only to Jewel in Chicago but to the surrounding area. If this volume were taken out of those plants, it would be little short of disastrous to the ability of those plants to continue to operate profitably.

This, according to the affidavits in this case, is what motivated Dean to be interested in this very difficult transaction. Dean is committing itself here on the day they signed [fol. 213] this agreement, to an obligation in money terms almost equivalent to their whole net worth.

Their net worth is about $15,000,000 and they had to commit themselves to about $12,000,000 to close this transaction. They would not do it in the light of what I have just said, and also in the light of the nature of Bowman's business which they are taking on, and which they are taking on only because they have a problem somewhat desperate, and this is a desperate way, hopefully, of solving that problem, providing only, and this is very important, providing only that the transaction can be concluded and Dean be afforded maximum flexibility to deal with the situation before the Bowman situation deteriorates any further. That is where the urgency is.

If Dean has to stand by after this publicity of these hearings and all the facts are out, there is no telling what Bowman's business will be a week from now if their principal customers should desert them in the light of what has now been made known.

[fol. 214] We made every effort, I should say, to keep this entirely secret until we came to this Court.

Judge Schnackenberg: Nothing is secret up here.

Mr. Chaffetz: I say, we made every effort to keep this entirely secret until we came to this Court.

Judge Swygert: The Federal Trade Commission argues that if there is not some kind of a restraining order or injunction and the contract is executed, divestiture or any remedial relief is practically impossible.

On the other hand, you say that if the deal does not go through now, you will withdraw—that is what you have said, I think, in effect—and it will become economically unfeasible ——

Mr. Chaffetz: That is right.

Judge Swygert: ——to prolong it.

Mr. Chaffetz: That is right.

Judge Swygert: Is there not a middle ground here?

Mr. Chaffetz: I wish there were, your Honor. Take the Bowman situation. I want to come to that now.

[fol. 215] They talk about a stay order to maintain the status quo. Bowman is losing $25,000 a week here in Chicago alone, every week, in their retail milk delivery routes. That loss may be much increased tomorrow when word of these proceedings gets out. They may lose more business.

They have lost $9,000,000 worth of sales in the last five years. They lost a million and a half dollars in Chicago just in 1964. They spent a million dollars to rehabilitate their Chicago plant, and the following year they still expect to lose, for the year 1965, close to a million dollars.

I think it is not realistic to talk about maintaining the status quo. Now, let me come to the most important thing, which is ——

Judge Swygert: Not maintain the status quo, but couldn't you operate Bowman under some sort of an arrangement ——

Mr. Chaffetz: At whose risk?

Judge Swygert: (Continuing) —until this hearing is finished, without wiping it out of existence?

Mr. Chaffetz: At whose risk? Who is going to stand the [fol. 216] loss? Are we going to pay $12,000,000 and agree to keep them going and lose the money?

On the other hand, your Honor, and this is what I have not gotten to yet, the fact of the matter is that Bowman has already decided to liquidate if they do not make this deal.

In the reply brief that was filed today counsel say something about an assertion like that being made in the heat of litigation, but this was not a decision made in the heat of litigation. This is the whole crux of the matter.

Bowman, on its own, before ever talking to Dean, the stockholders of Bowman, the stockholders of Bowman, decided that unless they could find a purchaser for the going concern, they would have to liquidate. They went to find purchasers. They came to us last.

They went to Carnation. They went to Fairmont Dairies. They tried to avoid any anti-trust question. They went to a company called Consolidated Badger and got no interest at all.

The only reason they got any interest from Dean is for the reason I indicated a while ago.

[fol. 217] Dean would not have wanted to take over Bowman unless they had a problem of their own, and they were hoping that by putting the two together they could solve that problem, so they came together and then what happened? Dean investigated the properties and said that they could not pay any more than two-thirds of the net worth of Bowman.

Does this suggest that Bowman could keep going and operate, that Dean could operate it or that Bowman could continue to operate, if the stockholders are willing to sell it for two-thirds of their book net worth?

That is what this deal is about. That's it. And then another thing, and this is in the affidavits: If the deal were made, Dean could only make a deal, Dean could only promise to commit itself for that large sum of money, provided it were in a position promptly to protect itself against the losses that have taken place.

Let me interrupt myself to be sure that I did not overlook one important thing. The Commission says that Bowman is not broke, that they have a lot of cash. As a matter

of fact, they said they showed on their annual reports a net profit for the last two or three years of a small amount.
[fol. 218] I want to be sure that your Honors realize that I have in mind the distinction between their investing some cash in securities and getting a return, and cannibalizing some of their plants and making a profit, which is what they have been doing.

By doing that they have been able to show a profit, but as far as their operations are concerned, their operations have been conducted at a loss for at least the last five years in increasing amounts, to the point where the stockholders took over. The principal stockholder, the biggest single stockholder, is a trust, is an estate of which the Northern Trust Company of Chicago is the trustee. There is another bank in Cincinnati that represents other stockholders.

The affidavits in this case of the majority of the stockholders represent to this Court under oath that they had decided that they would have to liquidate unless they could sell, and they represented to your Honors that if they cannot sell to Dean, which is the only purchaser they think is available, they are going to have to enter into voluntary liqui-
[fol. 219] dation, which is going to involve substantial losses.

They can recover some money in liquidation, but they cannot get what they can get from Dean when they sell as a going concern, provided Dean has the opportunity to try and keep the customers. If the customers should desert them, Dean will not even be able to take over the business.

Judge Swygert: The thing that bothers me, Mr. Chaffetz, is that this is all something that could be gone into and should be gone into and aired out thoroughly and very promptly in a plenary hearing, it seems to me.

Under any Section 7 merger the parties could always say to the Department of Justice or the Federal Trade Commission or whoever is challenging it, "If this does not go right through, the deal is off," so this would be a very powerful argument against granting any relief.

Mr. Chaffetz: I have made this argument myself many times to the Federal Trade Commission and the Department of Justice and prevailed without having to go to Court, and I have made the argument in Court.
[fol. 220] This is one of the facts of life in this kind of situation, and when the Court has jurisdiction, the decisions

make it clear that this is one of the factors that has to be taken into account.

If it is a clear-cut violation, or so clear that the Commission is bound to win in a final hearing, then these circumstances would not weigh with the Court. You certainly would say, "We are not going to let you violate the law", because you would be hurt if you did not. But that is not our case.

What we say is that the facts we have brought to your Honors' attention in short order, because of the nature of the proceeding, on affidavits, because of the nature of the proceeding, indicates in our opinion that there is not any likelihood of the Commission getting an order against us.

The very reason that Bowman will not exist is enough, so your Honors do not have to be concerned about whether the Commission could grant relief at the end of a hearing. There is not going to be any occasion for relief. Bowman will not be here.

[fol. 221] As I say, counsel countered that simply with the statement in the reply brief which says, "Oh, this is all said in the heat of litigation." I say to you that you have a half a dozen affidavits from responsible people, including the vice-president of the Northern Trust Company of Chicago, who tells you that that decision was made some time ago and it is a sound decision, it is a true decision. That is what took place.

There will be no Bowman if a stay is granted here. It seems to me, your Honors, that this is one of the factors you have to take into consideration as to whether there is occasion for granting relief or what harm would come to the public or to the Federal Trade Commission proceedings if you did not grant relief. There are not going to be any Federal Trade Commission proceedings. There is not going to be any Bowman. You cannot keep a dying horse alive. That is the situation here.

Let me say a little bit more about Bowman. This is not just something that was concocted for the purpose of this proceeding. Bowman at one time was the greatest milk [fol. 222] company in Chicago. They built up these home delivery routes and they were the tops in the business. They had twenty-two hundred routes. They had milk plants, they had bottling plants, they had distribution points and they had a fabulous business.

But the whole trend of the business has been against them. The home delivery route now in a big metropolitan area will not pay, it cannot pay, and they were stuck with the biggest home delivery route of any company here.

What has happened here is that with the supermarkets and the chain stores and big grocery stores, they began to handle milk themselves and were able to sell it more efficiently at a lower price to the consumer. The housewife drives up to the supermarket anyway where she buys her groceries and she wants to buy that milk for a cent or two cents or three cents less, if she can.

The result was that as more and more housewives withdrew from buying in this manner, Bowman's routes became more and more costly because their lost volume and cost [fol. 223] per unit continued to go.

To summarize that story, to bring it up to date, Bowman has dropped its routes from twenty-two hundred to five hundred, which they have today. They have closed all of their distribution points. They have closed all of their bottling plants. They have just this one big plant in which they invested a million dollars a little over a year ago, regretfully now, because the investment has not paid off.

Despite what I have just said, and this is half of their busines in Chicago that I am talking about, despite all this, despite the fact that they tried to cut down and eliminate loss routes and minimize their losses, despite that fact, in 1964 there is an affidavit of Arthur Anderson in this file which says they lost a million and a half dollars in Chicago alone in operations.

There cannot be any question of Bowman's good faith. There cannot be any question as to what this case is all about. I simply ask your Honors this question: Can you imagine, if the Commission after a hearing decided against [fol. 224] us and said, assuming there could be a hearing, "Regardless of these facts, we are not going to let Bowman sell out to Dean, they will have to liquidate, if they want to", is there any possibility that this court would sustain such an order?

I think not, but that is not my burden. I do not have to prove conclusively that we would win the case. What I have to do is create a doubt in your mind that there is any real probability that the Commission would prevail, and that is on their own basis, the only legal basis that they suggest in their brief here.

If, under these facts, you have real doubt as to whether the Commission would prevail after hearing, they tell your Honors that you should deny the equitable relief.

Judge Swygert: Is there not a third possibility, besides going out of business or selling to Dean? Is there some other company, such as the one that was mentioned in the affidavit who might acquire Bowman without the possibility of violating Section 7?

Mr. Chaffetz: Let me mention that affidavit. That is the [fol. 225] Wanzer Company.

I have alrea[illegible] said this to your Honors, that Bowman gave considera[illegible] to whom the potential purchasers might be and they believed they had exhausted that list before they came to us. They tried to get somebody outside of Chicago so as to avoid any antitrust question, and then they came to us.

They did not believe and they still do not believe and they represent to your Honors that there was no other possible purchaser.

Let me tell you about Wanzer. This Wanzer affidavit is an irresponsible, reckless, but riskless to Wanzer, attempt to spoil this transaction. We have affidavits which we got just in the last couple of days—when we saw the Wanzer affidavit, we did not believe it, and just in a couple of days we found two people with whom Wanzer had talked, one as far back as last November 9 or November 11, he had lunch with this man on November 11, and Wanzer said to that man, "I know that Bowman is negotiating to sell out to Dean." Wanzer made no move at that time to put in a bid or to tell Bowman, "We might be interested."

[fol. 226] As a matter of fact, Wanzer explained to this gentleman, a responsible individual, the president of a very substantial independent grocery company here in Chicago, that he understood what the problem was and why Bowman and Dean were getting together.

It was only when the papers were filed in this Court that the Wanzer affidavit was submitted here, which simply says, "We would be interested if the price is right." Of course, I would be interested if the price was right. If I could buy it for $100, I think I could liquidate and do something.

There is no commitment. It is, as I say, utterly reckless. Sure, they will say that. You could get a lot of people to say that.

Your Honors, this is not the first time this has happened to me. I have had this experience before this, where this kind of affidavit is brought up at the last minute from a small man, a small company. Their total net worth is only two and a half million dollars.

If there were time and if there were going to be a hearing, I would love to take this gentleman's deposition, but in the [fol. 227] posture in which this is before the Court today, we have gone as far as we can to discredit that affidavit. We have proved conclusively, as far as affidavits can prove anything conclusively, that this man, if he were in good faith, had ample opportunity to put in a bid before we signed the agreement.

This was November 9 or November 11, I cannot remember the exact date, and this agreement was not signed until December 13th. The only other thing they have here is, they said they had a vice-president of the First National Bank call up Bowman sometime earlier and ask if Bowman was for sale.

As far as Bowman is concerned, all they knew was that a vice-president of the First National Bank called and said, "Are you for sale?" He did not mention Wanzer, he did not mention any potential purchaser, but just said, "Are you for sale?"

Wanzer had every opportunity, if they were interested in buying the company, if they really were in good faith, to put in a bid and purchase.

The other thing I wanted to say to your Honors is this: There is not that much difference between Wanzer buying and Dean buying. If Dean should lose the Jewel Tea busi- [fol. 228] ness, which it expects to do, Dean in Chicago will be smaller than Wanzer, and if Wanzer buys Bowman, Wanzer and Bowman will be much bigger than Dean. Dean is not that big here in this market.

Dean has only 7 per cent, and of that 7 per cent, a great chunk of it is just one customer, so that certainly would provide no basis for this Court granting a stay here, pressing Dean to pull out of the transaction and leaving Bowman to pursue the will of the wisp of the possibility of selling to Wanzer. That is what is at stake here.

Under the contract Dean has to notify Bowman whether they are going to go through with the deal before the closing date on Monday. Now, if (before Monday, Dean notifies

Bowman that because there is a stay pending, or because the Court has not acted, Dean has to withdraw, Bowman will have to take its chances on this kind of a proposal. I want to——

Judge Schnackenberg: I want to ask you a question.

Mr. Chaffetz: Yes.

[fol. 229] Judge Schackenberg: You filed a motion today to have the Court make a confidential file of certain things.

Mr. Chaffetz: If that is an anathema to the Court, I will not press it.

Judge Schnackenberg: I think, in view of the revelations now, it is moot.

Mr. Chaffetz: We discussed it with the Clerk yesterday, your Honor. What we had in mind is that we knew there would be this publicity, and we proposed that the pleadings could be copied and made available to people to get the information.

Judge Schnackenberg: Do you withdraw the motion?

Mr. Chaffetz: If your Honor asks me to, I will. Perhaps I should.

Judge Schnackenberg: I think it is moot, now.

Mr. Chaffetz: All right. I will.

(Mr. Stevens spoke to Mr. Chaffetz in a voice inaudible to the Reporter.)

Mr. Chaffetz: Well, Bowman's counsel objects. Let me say what the reason for the motion is. I think it ought [fol. 230] to appeal to your Honors.

Judge Schnackenberg: Do you want to stand on the motion?

Mr. Chaffetz: What I would like to do is this: I would like to have the documents in the case be placed in a confidential file. This is what we ask, that the documents in the case be placed in a confidential file in the Clerk's office and not be made available to the press or the public.

What they can glean out of what they have heard this afternoon will be words, but they will not have the written material.

Judge Swygert: Do you make a distinction between the briefs and the affidavits?

Mr. Chaffetz: No; the briefs and affidavits.

Judge Swygert: You do not think there is any difference?

Mr. Chaffetz: No, no, because the briefs simply incorporate the material from the affidavits.

Judge Schnackenberg: What is your motion now, then?

Mr. Chaffetz: The motion, as we prepared it, was that the documents——

Judge Schnackenberg: Not what it was. What is your [fol. 231] motion now?

Mr. Chaffetz: The motion now is that the briefs and affidavits be placed in a confidential file in the Clerk's office until the further order of the Court.

Mr. Stevens: At least, if your Honors please, until the disposition of the main motion. That would be the relief we urgently seek.

Judge Schnackenberg: What motion are you relying on, the written motion you have made here, or some substitute motion?

Mr. Chaffetz: To my knowledge the written motion squares with the oral motion I just made. We intended, at least in the written motion, simply to ask that the written

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Judge Schnackenberg: We are depending on something definite here. Now, is the written motion the motion you are making?

Mr. Chaffetz: Yes, your Honor.

Judge Schnackenberg: We will rule on that in due course.

Mr. Chaffetz: Thank you very much.

I want to mention two more points in connection with the merits and then I want to come to the procedural ques- [fol. 232] tion, the jurisdiction of the Court, and I will try to be brief. I want to be sure that I leave the impression with your Honors that if this transaction is concluded, competition in Chicago will not be handicapped, but we maintain will be furthered.

What Dean has already decided to do, and it is in the affidavits and has been told to the Commission, is to get rid of these retail routes at the first moment. That is half of the Bowman business. They are going to turn it over to the small dairies who now, more profitably than Bowman can do it, have similar retail routes, which will help to improve their position.

I might say on that score that if the Commission wants to discuss with us what we will do, we will be glad to discuss it with them. We want to turn over the retail delivery routes, half of the business in Chicago, to small independent dairies who have similar routes now.

Judge Swygert: Do you think they will take it?

Mr. Chaffetz: Yes. We think they will, for this reason, your Honor: The problem is volume. A milk driver comes down your street and he has three or four stops on that [fol. 233]street but he may miss five or six houses. If he can fill in and the same driver can serve two or three times as many stops, that reduces the cost tremendously, particularly since the union rates, and I have not mentioned that at all, the union rates in this business are very high.

Judge Swygert: But he will not be selling Dean or Bowman milk.

Mr. Chaffetz: Milk, of course, is really a homogeneous thing. Each man packages under his own name and milk frequently comes from the same dairy. It would be up to the individual.

He may package his own milk, if it meets his specifications, but that has to be worked out. I am not an expert on that. The idea is, however, to make this volume available to the small dairies and hopefully to allow Dean to recoup some of its costs. That is the only way Dean expects to get back some of the consideration.

As I say, this will improve the situation here in Chicago. We are not going to end up with a monopoly or a dominant company or any company with a large percentage of the market. What we are going to end up with is that the [fol. 234]small dairies, those who are better able to handle this business, will be better off, the independents in the market will have a much bigger share of the market than they ever had before, and if Dean loses the Jewel Tea business and only is able to hold something less than half of the Bowman business, they will not be any bigger than they are now and they will still be a small company with something like twenty millions of sales in the Chicago market.

With respect to the law, there is any number of cases like this. I am talking about on the merits, now. I would like to mention one in which I participated myself before Judge Grubb in Milwaukee. This was one in which the Department of Justice brought the case.

This was a case in which Gimbel's the biggest department store in Milwaukee with facilities all over the country, purchased the other big department store in Milwaukee, Shuster's. Between the two of them, they had 54 per cent of the department store business in Milwaukee.

The Department of Justice made the same prima facie argument, that that is per se illegal, 52 per cent, that that [fol. 235] would violate not only the Clayton Act but the Sherman Act.

When Judge Grubb heard the evidence—it was on affidavits, but when he heard the evidence he said to the Government, "But Shuster's are not going to survive. Their losses are mounting year after year, they are worse and worse. Their competitors come in and tell me that it will hurt the community if this Shuster store closes down. One store has already closed," he said, "and the second is already in jeopardy."

He said, "There is no occasion for a court enjoining something that will enable the stockholders of Shuster's to get some of their money back, and if Gimbel's can take these stores over and operate them, isn't that good for the community?"

After careful deliberation and a long hearing, Judge Grubb denied the temporary injunction—that was not a restraining order, that was a motion for an injunction—and the Department of Justice never appealed, never proceeded further, and that was the end of that.

When United Air Lines bought Capital Air Lines there [fol. 236] was the same argument. They said, "Capital Air Lines is not bankrupt. It has a lot of money. Oh, sure, its operating losses are very high, but under the law United is too big, they can't buy Capital Air Lines."

But the Court said, and I think this was the District of Columbia Circuit, "Oh, now, don't tell us that. We are not going to force Capital Air Lines to go broke and liquidate. We think the best thing in the public interest is for United to take over Capital Air Lines."

In the Ling-Temco case, there was the same situation. There were two companies down in the Southwest and one was having serious troubles. It was not bankrupt, there was not a situation in which it was going to fail tomorrow, but their operating losses were mounting and there was no hope of survival, there was no hope that they could come back.

It was a good faith situation. They really were in financial straits in the sense that they could not earn a profit, and they were allowed to merge with Chance-Vought.

You have to distinguish that type of situation from the

[fol. 237] Erie Sand & Gravel cases, where a company has not shown that it is having real financial reverses but simply says, "Well, we would like to sell out", and that was the case. They said, "We would have sold out anyway if our No. 1 competitor did not buy us out", and the Court said, "Well, that is not enough." I would not come before you and urge that kind of a proposition here.

The Diebold case cited by counsel was a summary judgment case. If you will read that opinion you will see that what the court was concerned there with was that the court made the decision in an antitrust case on summary judgment, and the case was sent back for a full hearing.

I say to your Honors that on this record, with the limited facts that could be brought before your Honors on short notice because of the nature of this proceeding, it is clear that, first, Bowman is not going to survive, there is no occasion for maintaining the status quo, you cannot maintain the status quo, you cannot keep Bowman going, you cannot require them to keep Bowman going and you should not want to keep Bowman going.

[fol. 238] I would hope that you should think that in the public interest, if your Honors please, it is better that this transaction take place, and under those circumstances, I submit, and this is only tentatively, it is not a final hearing, but on the basis of the facts before you, the best you can do with the materials available, the best we could do in presenting the facts to you, as far as you now can see, as far as you now can see, you cannot conclude, I submit, that after a hearing before the Federal Trade Commission, if there should be one, the Commission would probably find a violation of the law and that this Court would sustain such a judgment of the Federal Trade Commission if they made it.

Let me come now very briefly to the question of jurisdiction. The question of jurisdiction arises in this posture: It is not a matter of what the jurisdiction of this Court might be if there were no administrative statute governing the administrative agency here.

Apart from the Federal Trade Commission Act and the Clayton Act, I am not sure myself what the jurisdiction of [fol. 239] the Court might be under varying circumstances.

At least the point here, the point that the Second Circuit made was that where Congress has acted and there is a

statutory plan, the Court has no authority to substitute its judgment for that of Congress as to what the statutory plan ought to be. That is really the issue here.

Judge Swygert: Either fortuitously or because of an administrative division of work, the Attorney General can come into a District Court and have the standing——

Mr. Chaffetz: Precisely.

Judge Swygert: (Continuing)—to ask for it and the District Court may grant it, and only because of a different route a different result eventuates, is that not correct?

Mr. Chaffetz: That is a choice that the agencies made. Your Honors were told that they talked about it and they decided the Commission should do it.

I think this, and I think it is very unfortunate: I think it is possible, and I hope I am wrong about this, that the agencies just concluded that this case would be a good [fol. 240] vehicle for another court test of the jurisdiction and the interests of the parties just pass along with it. I think if that is true, this is most unfortunate.

There is a lot at stake here and I think it would be very unfortunate if this transaction were allowed to die. It is even worse than this, your Honor, because there will be no ultimate test. As I said to your Honors, this is the last hearing.

If the parties contemplate getting a Supreme Court decision on this after a hearing before the Supreme Court months from now, there is not going to be any such hearing. This transaction is not going to survive. It can't.

At the very best, at the very best, if, come the closing date and Dean cannot close this transaction with the assurance that the courts are not going to interfere, Dean is going to have to say, "All bets are off. Six months or a year from now we will be glad to sit down and renegotiate with you again, if that is possible, but we cannot commit our $12,000,000 without knowing what we are going to get or when", and I think your Honors must appreciate that a business man cannot possibly do that.

[fol. 241] With Bowman losing money at the rate I have said here, with this publicity possibly stimulating a lot of other Bowman customers to desert, they might say, "Well, we are not going to stick with Bowman, they are selling out and they are going to liquidate, we will go some place else", Dean's only hope is to conclude this transaction as promptly as possible.

I delayed this thing more than anybody else. I wanted to give the Commission time. They wanted to conclude the moment they had an agreement because they were afraid of publicity ruining the transaction, ruining the deal.

I insisted that we wait until January 3, and then we postponed it until January 10 so that we could have this hearing. They are terribly concerned. There is a lot of money involved for a small company. A small company cannot take that risk.

It is not a matter of choice. As I say, it is not a matter of burdening the courts or of oppressing the Commission. They can't help it.

If they can close and get about their business very [fol. 242] promptly, and even if they do close and get about their business very promptly, there is very serious risk involved here. They may not get their money back. They hope, however, to solve their problem.

Now, let me come back to jurisdiction for a moment.

Judge Swygert: I hestitate to ask it again, but they do not have to go completely through with the transaction, do they? Is there not a method whereby a situation could be worked out under an order that would hold things somewhat in status quo so there would not be the problem of complete divestiture?

Mr. Chaffetz: There are two answers to that, your Honor, and I can only give one unless Judge Schnackenberg will let me go off the record for the other one.

The first answer is that this is such a complicated thing. These are obsolete and obsolescent plants. They are scattered over wide areas. There are trucks, there is equipment, there are customers.

Dean has to have maximum flexibility just to be sure it [fol. 243] protects this amount of investment. Conceivably they could renegotiate the deal and say, "We will not take this plant, we will not take this plant, but we will pay you that much less money."

Judge Schnackenberg, I would like again to renew my request to file a supplemental affidavit to put in the record what I am about to say in view of Judge Swygert's question, because the fact of the matter is that when we presented these matters to the Commission, we invited them to invite us down there in the event they had any particular aspects of the transaction that they objected to that they

would like us to deal with, because we thought that if they were worried about the situation in Podunk, we would try to meet it, or if they were worried about the situation in Cleveland, if we could possibly work it out between the parties we would try to.

We made it clear again and again and again that if there were any aspects of the situation or any particular parts of the transaction that they were concerned with they should invite us down so we could talk about it, but we [fol. 244] never heard any response to that suggestion.

We would have been willing to sit down with them then, before the contract was signed, before the matter became public, and satisfy them if we could in minor respects—I do not mean in major respects, but in minor respects, if we could have.

But today, in this posture, it just is not practical, your Honor. It is not practical. We become indebted to them on Monday morning for $12,000,000 and the only out we have under the contract is to call the thing off.

Judge Schnackenberg: You say you want to file an affidavit?

Mr. Chaffetz: I would like to file an affidavit simply to put myself under oath with respect to the statement I just made to Judge Swygert.

Judge Schnackenberg: I suggest that you make a motion in writing——

Mr. Chaffetz: Very well, your Honor.

Judge Schnackenberg: (Continuing)—and file it with the Clerk, stating the purpose of that.

Mr. Chaffetz: I will be glad to do that, your Honor.

[fol. 245] Judge Schnackenberg: We will rule on it in due course.

Mr. Chaffetz: Thank you very much, your Honor.

Judge Schnackenberg: Before you get away——

Mr. Chaffetz: I am not through yet.

Judge Schnackenberg: (Continuing)—I want to make sure whether you are abandoning in any manner or to any extent the position taken in your documents filed here.

In your brief in opposition to the Commission's emergency petition for preliminary injunction and other relief, citing page 34, you say:

"The applicable statutes and court decisions leave no doubt that Congress did not intend to give the Federal Trade Commission power to obtain preliminary injunctive relief."

Are you still insisting on that?

Mr. Chaffetz: Oh, there is no question about that, your Honor. I have no reservations at all about that.

Judge Schnackenberg: You are or you are not?

[fol. 246] Mr. Chaffetz: I am not abandoning that position. That is our position. I think it is as clear as the driven snow.

Judge Schnackenberg: You do not have to dress it up any. You are standing on that?

Mr. Chaffetz: Absolutely. I was just about to continue my argument on that point, your Honor. I said I was not completed.

Judge Schnackenberg: All right. That is the most interesting thing. That is what I came to hear today.

Mr. Chaffetz: I am glad.

Judge Schnackenberg: I have not heard you say anything about that yet.

Mr. Chaffetz: Let me be candid about that, your Honor.

Judge Schnackenberg: I assume you are candid with us on everything.

Mr. Chaffetz: I want to be. I think we are right on that point. I do not think there is any question that this Court has no jurisdiction. All you have to do is just quote the Chairman of the Commission.

Judge Schnackenberg: It is not a question of whether [fol. 247] we have jurisdiction.

Mr. Chaffetz: Yes.

Judge Schnackenberg: The question is, does the Commission have jurisdiction to be here.

Mr. Chaffetz: Precisely. They do not have. I am going to deal with that in a minute, your Honor, but let me tell you why I argued this matter the way I did. I may be wrong about this, but I want you to know at least what my strategy is.

Judge Schnackenberg: We will tell you where you are wrong. Argue that, now.

Mr. Chaffetz: All right. I will, your Honor.

In the first place, the statute provides what the authority

of the Commission should be. It provides what the authority of the Department of Justice should be. It provides what the private parties' rights may be.

Then you come to the amendment of Section 11C in 1959, where the Congress, taking note of the situation again, reviewing the situation once more, again amended the statute, this time giving the Commission some relief in the prem-
[fol. 248] ises, because it says that the Court of Appeals, once jurisdiction attaches, once jurisdiction attaches, has the right to grant any equitable relief required in the premises.

I say that alone is conclusive. If Congress in 1959 says that you have that jurisdiction once the record is filed here, does it not mean that you do not have that jurisdiction and the Commission does not have the right to ask for it before the record is filed here?

That is what I refer to as the statutory scheme. That is what the Second Circuit said about it.

Judge Swygert: The Seventh Circuit?

Mr. Chaffetz: The Second Circuit. I may have misspoken.

Interestingly enough, in a different situation, where the Congress thought that the Commission should have authority to go to the courts, they amended the statute, the Federal Trade Commission Act, in 1938, in the Wheeler-Lee Act, Section 13 of the Federal Trade Commission Act, and they gave the Commission there limited authority to pro-
[fol. 249] ceed in the courts where false advertising was involved and where the Commission was of the opinion that they should get relief in the courts without waiting for a full proceeding.

Again, Congress is planning the authority that the Commission should have. I thought Judge Swygert asked a very interesting question of Mr. Stern about why, if the Court could act in these cases, it could not act in all cases, in a Section 5 case, in a Robinson-Patman case. Logically, there is no difference.

Suppose the Commission has a Robinson-Patman case and they are worried that before their hearings are over within three months or six months or a year, the little fellows being adversely affected will be out of business. Why wouldn't they be up here asking your Honors for temporary relief to protect your jurisdiction until after

they have had a chance to act? They would say, "It will be moot. We will not need a proceeding because it is going to be too late at that time."

The logic of their argument is that in any case where Congress has limited the Commission to acting in a slow, [fol. 250] steady way, with hearings, appeals, final reports, motions and a petition for review, because Congress has set up the Commission as that kind of agency, has seen fit to do so, why shouldn't they come in here every time, in every one of their cases and say, "It takes us a year, so we want the court to grant preliminary relief"?

I have cases down there that have been there four or five years, and——

Judge Swygert: Do you think it would be better if you took Section 7 out of the Federal Trade Commission Act completely?

Mr. Chaffetz: No, no. They have had many Section 7 cases. All the cases are not of this kind, but when they have a case of this kind the Department of Justice has authority. We have but one Government. I do not understand this treaty between them, that the Federal Trade Commission will handle milk cases.

As a matter of fact, there have been a number of Department of Justice milk cases right here in Chicago. One of the most famous milk cases, the Borden case, was right here in Chicago and that was a Department of Justice case. [fol. 251] Judge Swygert: Perhaps there is too much cooperation between them.

Mr. Chaffetz: I do not know about that, but they come before the Court——

Judge Schnackenberg: I will have to stop you right there. Your time is up.

Mr. Chaffetz: Thank you very, very much, your Honors.

Judge Schnackenberg: You have had one hour. Thank you very much.

Mr. Stevens: May it please the Court, may I have just two or three minutes on behalf of the Bowman Dairy Company?

Judge Schnackenberg: You are Mr. Stevens?

Mr. Stevens: Yes.

Judge Schnackenberg: Whom do you represent?

Mr. Stevens: The Bowman Dairy Company.

Judge Schnackenberg: How much time do you want?

The hour has been taken up that was assigned. How much time do you want, Mr. Stevens?

Mr. Stevens: Certainly no more than five minutes. I will try to be through in two or three.

Judge Schnackenberg: You may go ahead.

[fol. 252] ARGUMENT ON BEHALF OF BOWMAN DAIRY COMPANY BY MR. STEVENS

Mr. Stevens: If the Court please, Mr. Chaffetz and I decided that in the interest of orderly procedure we would not divide the argument, because we understand the problem this Court has with matters, not of this kind because nothing quite like this has ever been before the Court before, but I do want to comment very briefly on the procedural situation because it is a matter of vital importance to the Bowman Dairy Company.

It is brought here as a test case, to test out a jurisdictional issue, but the outcome of this case has a very practical significance to the stockholders of the company.

Now, what is our procedural situation? They are here under a statute, the All Writs statute, which was originally designed, and it is a very ancient statute, to enable the Courts to preserve their historic jurisdiction, and historically this is an appellate court. It acts on briefs and on a record which is made in detail below, where the parties have an opportunity to cross examine and work out these various collateral issues that have been brought to the fore here and create problems that I do not, with all due re-
[fol. 253] spect, feel that this Court historically is used to dealing with.

Working out the kind of order which would preserve the Bowman Dairy Company, which is losing money at the rate it is in the Chicago market, is a problem that cannot be decided on an emergency matter of this kind. It is just too serious, with all due respect to the skill and all the other abilities that the Court has. This proceeding is not appropriate for this Court.

The Diebold case which Mr. Stern cited was a case in which the Supreme Court sent the matter back because it was decided on affidavits. The question of the failing company doctrine cannot be appropriately resolved on affidavits.

The failing company doctrine, if I may just mention it, involves the question of whether there is an adverse competitive effect on the market that is relevant. The market that is relevant, according to the Commission, is the Chicago milk market. Will the change in the operations of the Bowman Dairy Company hurt competition, if they are bought by Dean, any more than if they continue to lose [fol. 254] money at the rate they are losing and piecemeal have a liquidation over a period of time, which they are clearly going to have?

You only have to look at the statistics as to Chicago to see what is going to happen to this company in the only relevant competitive market.

Should this Court be deciding this issue, which affects real people, on the basis of a group of affidavits and the kind of record we have before us? I think the record conclusively shows the effect of this proceeding on the Bowman Dairy Company, and I urgently urge the Court to confine its jurisdiction to its historic function, and I respectfully suggest that when the Commission says they will be through with this proceeding in a year, "Just hold tight for a year and you will not have any problem", you will have a different bundle of assets a year from now than you have now, what they will be, I cannot tell the Court, but we know the history up to the time this matter became public knowledge.

What it is in the last few days since it has become public [fol. 255] knowledge is not in the record, but it certainly is not going to be any more favorable.

Finally, when Mr. Stern says, "Well, although the Commission has not been here for fifty years in a proceeding like this, and this is unique to come in in a Section 7 case, we do not think we will have any other cases other than Section 7, we will not bring in Robinson-Patman cases, we will not bring in fictitious advertising cases, we will not bring in any of those", how do we know?

They have not thought of it yet, but what do we know as to what they will think of for this Court to do and convert its function from an appellate court to, really, a trial court where you will be hearing matters of this kind necessarily on the evidence, because that is what you have to act on.

Judge Swygert: Of course, that argument can be met by

saying that that problem can be met at the appropriate time, whenever they try to come in on a Section 7 case.

Mr. Stevens: The legal argument, your Honor, is precisely the same, whether it is Section 7 or not, and I do [fol. 256] not know the legal distinction between a Section 7 case and any other case.

If anything, I would respectfully suggest that their position is weaker in a Section 7 case, because the violation does not occur, if any, until the acquisition takes place, and the signing of the contract is not an acquisition.

They try to rely on a Sherman Act situation, but they have not relied upon it because the Sherman Act is not what is alleged to be violated.

With all due respect, I suggest that a Pandora's box is about to be opened if the Court accepts the invitation to make a test case out of this proceeding. Thank you very much.

Judge Schnackenberg: Do you agree with Mr. Chaffetz's contention that the Commission has no right to initiate this proceeding in this Court?

Mr. Stevens: We think it abundantly clear, your Honor, that there is no——

Judge Schnackenberg: Yes or no? Do you agree?

[fol. 257] Mr. Stevens: That there is no jurisdiction, yes, and further, that even if there is jurisdiction, it would be thoroughly——

Judge Schnackenberg: No jurisdiction in the Commission to initiate this proceeding in this Court? Is that what you are saying?

Mr. Stevens: Yes, your Honor.

Judge Schnackenberg: Very well. Thank you very much.

Mr. Chaffetz: Your Honor, I do not wish to argue further. I would like to just call your attention to the fact that we do have a motion to vacate the stay that your Honor signed two or three days ago, and I have no doubt you have that in mind.

The closing date is Monday under paragraph 8 of the agreement, and we have to notify Bowman before the closing date if we want to withdraw from the agreement.

Judge Schnackenberg: Yes. We will finish with the rest of the arguments now. You have six minutes left, Mr. Stern.

[fol. 258] ADDITIONAL ARGUMENT BY MR. STERN

Mr. Stern: Mr. Chaffetz invites the Court to put aside the jurisdictional question and instead deny on the merits.

I appreciate Mr. Chaffetz's generosity in attempting to consent to our argument that there is jurisdiction. However, I will read two sentences from the Brown Shoe opinion, which is 370 U.S., and I am reading at page 305:

> "The mere consent of the parties to the Court's consideration and decision of the case cannot by itself confer jurisdiction on the Court", citing cases.
>
> "Therefore, a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before it", citing cases.

The Court can affirm, it can dismiss or it can—excuse me. The Court can grant the petition, it can dismiss the petition or it can deny the petition. If it denies the petition, however, it will decide that it has jurisdiction.

I only wish to draw to the Court's attention that dismissal and denial are not the same as the Second Circuit [fol. 259] recognized in the International Paper case, where it dismissed.

I, of course, urge, for the reasons I have given before, that the Court has ample jurisdiction to act in the premises.

We have here an acquisition in which the first ranking firm, what is probably the first ranking firm, is acquiring the third ranking firm, and it will be by far, after the acquisition, the first ranking firm. It will have 16 per cent plus 7 per cent, which is 23 per cent.

In Exhibit I, our affidavit to the reply memorandum submitted today, we show that the number of dairies in Chicago has declined from 107 in 1954 to 70 in 1961 to 57 in 1965. That is, half of the dairies have gone out of business.

It is our position that these facts make out a prima facie case that there is a sufficient showing on this basis that a violation of Section 7 and Section 5 will probably be found by the Commission.

This evidence, this showing, has not been rebutted by any substantial showing.

Judge Swygert: What do you say about the representa- [fol. 260] tion that there will be no hearing because Bowman will be out of existence?

Mr. Stern: This is a situation like a contempt, where the party in contempt holds the keys to his prison. They can cancel their contract, they can go out of business, they can do many things if they choose to. We cannot control them.

I think that the threats of parties cannot be allowed to control the Court's exercise of its jurisdiction.

If the Court believes that this will violate the law, if the transaction is completed, and if the Court believes, as we have urged, and I think the parties are agreed that it will not be possible to restore the status quo, but the mere fact that one of the parties says, "Well, I am not going to stand by and allow you to interfere with my transaction, I am going to go out of business, or I am going to call off the deal, I will not renegotiate it. If you do not let me do this on Monday, I will not do it", I really do not think that the Court, in the sound exercise of its discretion, should allow such considerations to prevent it from doing what it regards to be its responsibility.

[fol. 261] The only other thing I have to say is that we oppose this motion to vacate the Court's temporary restraining order, and we move, as we have in our papers. that the Court enter a temporary restraining order so that we may exhaust our remedies in the circumstances.

Judge Schnackenberg: Thank you, gentlemen. This matter will be taken under advisement as to the issues of a temporary or preliminary injunction, and the temporary restraining order heretofore issued will remain in effect until further notice. The Court will now rise.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

[fol. 262] Reporter's and Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 264-266] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

[Title omitted]

Motion to Supplement Record By Addition of Affidavit of William R. Jentes—Filed January 7, 1966
(omitted in printing.)

* * * * * * *

[fol. 267] [File endorsement omitted]

STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF WILLIAM R. JENTES IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION—Filed January 12, 1966.

WILLIAM R. JENTES, being first duly sworn, on oath deposes and says that:

1. He is one of the attorneys for Dean Foods Company, one of the respondents in this proceeding.

2. On November 2, 1965, Mr. Hammond E. Chaffetz and affiant met with Mr. Robert A. Hammond, Chief of the Merger Section of the Federal Trade Commission's Bureau of Restraint of Trade, at the latter's office in Washington. Mr. Chaffetz explained to Mr. Hammond that his purpose was to discuss with Mr. Hammond in a preliminary way a possible sale by Bowman Dairy Company of its dairy operations to Dean Foods Company. Mr. Chaffetz stated that he was speaking for Bowman as well as for his client, Dean Foods Company. Mr. Chaffetz then recited the essential facts of the proposed transaction and the factual setting in which it arose. Among other things, he explained that:

a. Bowman had been suffering severe operating reverses in recent years, including a substantial decline in sales and large operating losses.

[fol. 268] b. These operating losses were particularly severe in Chicago, due primarily to a shift in consumer buying habits from home delivery, in which Bowman had long been heavily concentrated, to store purchasing.

c. Bowman's management had made every effort to find an internal solution to its financial and operating difficulties, but had finally come to the conclusion that the only way to halt its operating losses was to withdraw from the dairy business.

d. Bowman's management and its stockholders had, accordingly, concluded that it must either sell its dairy operations to another company or effect a piecemeal self-liquidation.

e. Bowman had approached Dean, which it felt would be the only realistically available purchaser, and was currently negotiating a possible sale to Dean.

f. Dean was interested in the transaction primarily because it was threatened with the loss of its largest single account, Jewel Tea Company, which could have a significant effect on its sales, profits, operating efficiency and competitive vitality.

g. Dean planned to sell Bowman's home delivery routes to smaller dairies in Chicago which would tend to strengthen their competitive position in the market.

3. At the conclusion of the November 2nd meeting, Mr. Chaffetz told Mr. Hammond that, while he was not asking [fol. 269] for the Commission's approval of any proposed sale, he wished the Commission's staff to be fully advised concerning the transaction and have an opportunity to satisfy itself concerning the factual statements which he had made. Mr. Chaffetz stated that Bowman and Dean would shortly forward to Mr. Hammond statistical data which the companies felt the Commission's staff might find helpful in its analysis. Mr. Chaffetz further offered to have representatives of the two companies come to Washington to meet with Mr. Hammond or the members of his staff to answer any questions they might have about the proposed transaction.

4. On November 4, 1965, affiant forwarded a seven page

letter to Mr. Hammond outlining for him the facts relating to the proposed transaction. Attached to affiant's letter were twelve enclosures; these included such items as the balance sheets and income statements for Dean and Bowman, a preliminary draft of the purchase agreement, a list of Dean and Bowman facilities, a list of competitors in the areas where Dean and Bowman operate, etc.

5. On November 12, 1965, affiant and Mr. Donald Kempf, another of respondents' counsel, met in Chicago with Mr. Mark Haase, a staff investigator for the Federal Trade Commission, who interviewed Mr. L. Edward Hart, one of Bowman's directors and its counsel, during the morning and Mr. Kenneth Douglas, one of Dean's Vice Presidents, during the afternoon. At the outset of both interviews, Mr. Haase was told that the Bowman and Dean representatives [fol. 270] were prepared to answer any questions which Mr. Haase might have and to provide him with any statistics or other information he might request. Consistent with this position, Mr. Hart and Mr. Douglas freely responded to all questions posed by Mr. Haase and fully explained to him all aspects of the proposed sale by Bowman to Dean as well as its competitive implications in Chicago and elsewhere. At the conclusion of the interviews, Mr. Haase expressed his appreciation for the complete cooperation given to him by Dean and Bowman and stated that his questions had been answered to his satisfaction. Affiant then invited Mr. Haase to talk with other Dean and Bowman representatives and also with the officials of the Northern Trust Company who, as co-executor of the estate of Lula E. Bowman, controlled the largest block of Bowman stock.

6. On November 19, 1965, affiant wrote Mr. Haase forwarding six additional enclosures, which supplied information requested by Mr. Haase during his interviews in Chicago.

7. On December 3, 1965, affiant received a telephone call from Mr. William Boyd, Jr., who had replaced Mr. Hammond as the Chief of the Commission's Merger Section. Mr. Boyd stated that the Commission staff had considered the data supplied to it and that it was the staff's conclusion that it would recommend an investigation of the Bowman-Dean transaction in the event that the proposed sale was consummated. Mr. Boyd further stated that it was the staff's tentative conclusion that it would recommend that a complaint be filed, although he indicated that a final con-

[fol. 271] clusion would have to await further investigation. Affiant stated that since Mr. Boyd had only recently assumed his new position and had not personally discussed the proposed transaction with counsel or any officials of Dean or Bowman, he would appreciate an opportunity to discuss the matter with Mr. Boyd at his office.

8. On December 7, 1965, affiant and Mr. Kempf met with Mr. Boyd and Mr. Haase at the Commission's offices in Washington. During this conference, affiant again reviewed the facts of the transaction and invited Mr. Boyd to discuss any of the matters about which he had any questions with top officials of Bowman, Dean, or other interested parties. Mr. Boyd stated, however, that he did not feel that such discussions were necessary. Mr. Boyd also declined to discuss any alternative to a complete abandonment of the proposed transaction by Bowman and Dean. He also declined to discuss the methods by which Dean planned to dispose of certain of the Bowman assets and the persons or companies to whom such assets should be sold.

9. On December 14, 1965, affiant called Mr. Boyd to inform him that Bowman and Dean had signed a purchase agreement the preceding day. Affiant explained to Mr. Boyd that neither Bowman nor Dean wished to appear to be defying the Commission. Affiant stated that both companies had simply concluded that, in view of the transaction's importance to them and counsel's conviction that no violation of [fol. 272] the anti-trust laws was involved, it was in the best interest of all concerned to enter into the agreement.

10. On December 20, 1965, Mr. Boyd called affiant and informed him that the Commission would file an administrative complaint and would seek a preliminary injunction against the closing of the proposed Dean-Bowman transaction. This was the first notice given to either Bowman or Dean that the Commission planned to seek to stay the transaction or request that the assets be separated and maintained in status quo.

In Witness Whereof the undersigned has executed this affidavit this — day of —, 1966.

———, ———.

Subscribed and sworn to before me this — day of —, 1966.

———

[fols. 273-275] Proof of Service (omitted in printing.)

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT OF WILLIAM J. BOYD, JR.—Filed January 18, 1966

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, ss:

1. My name is WILLIAM J. BOYD, JR. I am the Chief of the Division of Mergers, Bureau of Restraint of Trade, Federal Trade Commission. My business address, and that of the Federal Trade Commission, is Washington, D. C. 20580.

2. I became Acting Chief of the Commission's Division of Mergers on November 22, 1965, and Chief of the Division on December 9, 1965. Upon assuming the position of Acting Chief, I was informed of the proposed acquisition of Bowman Dairy Company by Dean Foods Company and of the status of the Commission's investigation of the proposed acquisition. I was informed by my predecessor, Mr. Robert A. Hammond, and by Mr. Mark W. Haase, the attorney in the Division of Mergers handling the investigation, that, *inter alia*, the following events had taken place:

a. On November 2, 1965, Mr. Hammond met with counsel for Dean Foods Company in Mr. Hammond's office in Washington. Counsel for Dean stated that, while no formal agreement had been reached, Dean planned to acquire Bowman. Counsel stated that while Dean was not interested in obtaining a formal Advisory Opinion, pursuant to Sections 1.51-1.54 of the Commission's Rules, it was interested in obtaining an informal reaction from the staff [fol. 277] of the Division of Mergers as to the legality of the merger and the likelihood that a complaint would be recommended against the acquisition if consummated. Counsel for Dean indicated that Dean planned to acquire Bowman on December 4, 1965 and requested a staff reaction before that date. It was further indicated that Dean would not want to acquire Bowman if it appeared likely that the Federal Trade Commission would challenge the acquisition. Counsel for Dean also indicated that Dean was prepared to agree to Commission approval of the dis-

position of certain Bowman assets. Mr. Hammond agreed to convey to Dean the requested staff reaction by December 4, 1965.

b. Mr. Hammond then instructed Mr. Haase to initiate an investigation of the proposed acquisition. Accordingly, Mr. Haase reviewed certain information supplied by counsel for Dean in a letter dated November 5, 1965. Also, on November 5, 1965, Mr. Haase telephoned counsel for Dean requesting additional information. On November 12, 1965, Mr. Haase interviewed officials of both Dean and Bowman in Chicago. On November 19, 1965, Mr. Haase telephoned counsel for Dean in Chicago to ascertain when the additional information requested in the November 5, 1965 letter could be expected; this information was received on November 23, 1965.

[fol. 278] 3. On or about November 30, 1965, Mr. Haase recommended to me that Dean be advised that the staff believed, on the basis of its investigation and the information made available by Dean, that the acquisition of Bowman would violate the antitrust laws.

4. On December 3, 1965, I telephoned William R. Jentes, counsel for Dean, to advise him that the staff had carefully considered the matter and had concluded that (1) the acquisition of Bowman by Dean would raise serious questions under the antitrust laws, (2) a formal investigation would be initiated if this acquisition were consummated, and (3) on the basis of the information now available the staff would recommend that the Commission issue a complaint against the acquisition. I strongly recommended, however, that Dean seek a formal Advisory Opinion from the Commission.

Mr. Jentes stated that his client still did not wish a formal Advisory Opinion but he indicated a desire to speak with me further on the matter since I had only recently assumed the duties of Division Chief. I stated that I had telephoned because of Dean's request for a staff reaction no later than December 4, 1965, but that I would be happy to talk with counsel or with officials of Dean and Bowman.

5. On December 6, 1965, I received a telephone call from Mr. Jentes requesting a conference the following day. I agreed.

[fol. 279] 6. On December 7, 1965, Mr. Haase and I met with counsel for Dean, Mr. Jentes and Mr. Donald Kempf.

At the end of this conference, I again stated the staff's belief that the proposed acquisition would violate the antitrust laws and that a complaint would be recommended if the acquisition were consummated. Once again, I recommended that Dean seek a formal Advisory Opinion from the Commission.

I did not "decline to discuss any alternative to a complete abandonment of the proposed transaction" at this meeting. Nor did I "decline to discuss the methods by which Dean planned to dispose of certain of the Bowman assets." I did state to counsel for Dean that, in view of the fact that Dean planned to retain Bowman's most lucrative assets and business, particularly in the areas in which Dean and Bowman compete with one another, settlement on such a basis would be unacceptable.

7. On December 14, 1965, I received a telephone call from Mr. Jentes. He stated that Dean and Bowman had executed a formal purchase agreement and that the closing date for the acquisition was January 3, 1966. I requested, and Mr. Jentes agreed to furnish, a copy of the purchase agreement. This agreement was received on December 16, 1965. Until December 14, 1965, there was no evidence in the possession of the Commission that Dean and Bowman had formally agreed to the acquisition.

[fol. 280] 8. On December 20, 1965, six days after being advised that Dean and Bowman had formally agreed to merge, I telephoned Mr. Jentes and advised him that the Federal Trade Commission had determined to issue a complaint challenging the acquisition and further that the Commission intended to seek a temporary restraining order, preliminary injunction, and other appropriate relief.

William J. Boyd, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this 17th day of January, 1966.

Frances Pileggi, Notary Public.

My Commission Expires Dec. 31, 1968.

[fol. 281] Certificate of Service (omitted in printing.)

* * * * * * *

[fol. 282] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15493

Before—Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE, LUTHER M. SWYGERT

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

ORDER DISSOLVING THE TEMPORARY RESTRAINING ORDER AND DISMISSING THE PETITION—January 19, 1966

Federal Trade Commission, petitioner herein, filed its petition in this court on December 30, 1965 praying for a preliminary injunction, a temporary restraining order and other relief in aid of the jurisdiction of this court, under 15 U.S.C. §§ 21 (c) and 45 (c), to review final orders of the Federal Trade Commission, and therein represented to this court that the question presented was "whether this Court should exercise its discretion to grant equitable relief to preserve the status quo *pendente lite*, where the respondents will imminently consummate a merger (1) which will probably violate the antitrust laws, and (2) against which the Commission's ability to enter an effective order will probably be seriously impaired, unless the respondents are appropriately restrained by this court."

According to petitioner, the statutes involved are: the All Writs Act, 28 U.S.C. § 1651 (a); the Clayton Act, §§ 18 [fol. 283] [§ 7] and 21 (c) [§ 11 (c)], 15 U.S.C.; and the Federal Trade Commission Act, § 45 (a) (1) [§ 5 (a) (1)], and (c) [§ 5 (c)], 15 U.S.C.

This court entered on January 4, 1966, a temporary restraining order herein pursuant to the petition therefor filed by the Commission, in which it was charged that a complaint had been filed by the Commission against the

respondents Dean and Bowman, instituting the administrative proceeding now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean and charging that such agreement and acquisition are in violation of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45(a) (1).

Said restraining order is still in full force and effect according to its terms and provisions, inasmuch as an emergency petition for preliminary injunction filed by said Commission is pending and unadjudicated at this date.

Dean Foods Company and Bowman Dairy Company, respondents, having filed herein on January 5, 1966 their brief challenging the authority of the Commission to obtain a preliminary injunction against a supposed violation of § 7 of the Clayton Act or § 5 of the Federal Trade Com- [fol. 284] mission Act and asserting that the sole grant of enforcement authority of the Commission is contained in § 11 of the Clayton Act (15 U.S.C. § 21), which section provides only for the issuance of cease and desist orders after a full administrative hearing with review by a court of appeals and the Supreme Court before such orders become final; the court has considered the briefs and arguments of counsel, as well as various references to the records and proceedings in the Congress of the United States, which reveal that in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.

Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this [fol. 285] court, It Is Hereby Ordered that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

Elmer J. Schnackenberg, Judge. Latham Castle, Judge. Luther M. Swygert, Judge.

A True Copy:

Teste:

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit.

[fol. 286] Clerk's Certificate to foregoing transcript (omitted in printing).

[fols. 287-288] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY and BOWMAN DAIRY COMPANY, Respondents.

MOTION OF RESPONDENT BOWFUND CORPORATION FOR LEAVE TO SUPPLEMENT THE RECORD BY FILING THE AFFIDAVIT OF GORDON ADAMSON—Filed February 24, 1966
(omitted in printing)

* * * * * * *

[fol. 289] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF GORDON ADAMSON—Sworn to February 8, 1966

GORDON ADAMSON, being first duly sworn on oath, deposes and says as follows:

1. He is the duly elected, qualified and acting Secretary and Treasurer of Bowfund Corporation, an Illinois corporation formerly named and known as Bowman Dairy Company.

2. The documents attached hereto as Exhibits "1" through "10" are true copies of duly executed and effective amendments to the Purchase Agreement entered into between Bowman Dairy Company and Dean Foods Company on December 13, 1965. Each of said amendments was executed and delivered and became effective on the date such instrument bears.

3. At approximately 11:15 A. M. on January 19, 1966 he was notified that the proceedings which had been instituted by the Federal Trade Commission versus Bowman Dairy Company and Dean Foods Company in the United States

Court of Appeals for the Seventh Circuit on December 30, 1965 had then been dismissed by order of said court. At 2:00 o'clock P. M. on said date Bowman Dairy Company tendered performance under the aforesaid Purchase Agreement. Thereupon, officers and attorneys of Bowman Dairy Company and Dean Foods Company proceeded to close the transaction contemplated by the Purchase Agreement and said transaction was then consummated. In the course of the said closing, which he attended, all of the assets covered by the Purchase Agreement were trans-
[fol. 290] ferred to Dean Foods Company by instruments duly executed on behalf of Bowman Dairy Company which included:

a. Deeds, in recordable form, to fifty-one (51) parcels of real estate, being all real estate formerly owned by Bowman Dairy Company or its subsidiaries. During the closing each of said deeds was delivered or forwarded for recording to the county and state to which it pertained.

b. Bills of sale to all personal property of every description formerly owned by Bowman Dairy Company or its subsidiaries other than those assets excluded by the terms of the Purchase Agreement.

c. Instruments, in form suitable for recording in the United States Patent Office, transferring all unexpired trade marks formerly registered in the name of Bowman Dairy Company or its subsidiaries. Immediately following said closing these instruments were forwarded for recording to the United States Patent Office.

d. Endorsed certificates of title to every motor vehicle formerly owned by Bowman Dairy Company or its subsidiaries. Said certificates were duly forwarded to the appropriate officials for each state in which such vehicles had been registered for transfer and relicensing.

e. Other supplemental and corroborating documents to effect the transfer of said assets.

In the course of such delivery, all liabilities of Bowman Dairy Company and its subsidiaries other than those ex-
cluded by the terms of the Purchase Agreement were as-
[fol. 291] sumed by Dean Foods Company through instruments prepared and executed for that purpose. In the course of said closing, Dean Foods Company paid the sum

of Four Million Dollars ($4,000,000.00) in cash to Bowman Dairy Company, which sum of money was deposited in Bowman's bank account on the afternoon of January 19, 1966.

4. On the afternoon of January 19, 1966, immediately following the aforesaid closing, possession of all assets covered by the Purchase Agreement was delivered to Dean Foods Company, including Bowman's route books, customer lists and business files. At that time complete detailed inventories of all such assets, wheresoever located, were commenced. All of such inventories were completed no later than the morning of January 20, 1966. Effective as of the close of business on January 19, 1966 the persons theretofore employed by Bowman Dairy Company to operate its dairy business were removed from Bowman's payroll.

5. By amendment to its articles of incorporation effective as of January 19, 1966, through acceptance for filing on that date by the Secretary of State of Illinois, the name of Bowman Dairy Company was changed to "Bowfund Corporation". A resolution unanimously authorizing that amendment had been approved by the shareholders of Bowman Dairy Company at a special meeting at which more than ninety-seven per cent (97%) of the issued and outstanding shares of the corporation were represented in person or by proxy. At the same shareholders' meeting, [fol. 292] held on January 3, 1966, the Purchase Agreement entered into by and between Bowman Dairy Company and Dean Foods Company on December 13, 1965 was ratified and approved by a unanimous vote of the shareholders.

6. On the morning of Jauary 20, 1966 the $4,000,000.00 in cash which had been paid to it by Dean Foods Company on the previous day was invested by Bowfund Corporation in commercial paper issued by other corporations.

7. He has read the "Opposition of Bowman Dairy Company to Application for Preliminary Injunction" filed with the Clerk of the United States Supreme Court in response to the petition of the Federal Trade Commission presented before The Honorable Justice Clark. The statements made therein are true and correct.

8. The document attached hereto as Exhibit "11" is a true and correct copy of the unaudited balance sheet of

Bowman Dairy Company as of June 30, 1965. Said document was attached to the Purchase Agreement entered into between Bowman Dairy Company and Dean Foods Company on December 13, 1965 as Exhibit "A" to said Purchase Agreement. The following statements are based upon the figures appearing on that balance sheet and in the Purchase Agreement between Bowman and Dean dated December 13, 1965:

a. The book value of the assets sold from Bowman to Dean under the Purchase Agreement was Nineteen Million, Ninety-Six Thousand Eight Hundred Fifty-One Dollars ($19,096,851.00), computed as follows:

[fol. 293]

Total Assets		$26,414,417.00
Assets excluded as per paragraph 1–P		
Cash	$ 2,488,077.00	
U. S. Government Securities	748,501.00	
Marketable Securities	2,909,972.00	
Stated miscellaneous investments	48,140.00	
Installment contract	209,933.00	
Life insurance policies	912,943.00	
		7,317,566.00
Non-Excluded Assets		$19,096,851.00

b. The price which Dean agreed to pay for such assets was Twelve Million Five Hundred Thirty-Eight Thousand Three Hundred Eighty-Four Dollars ($12,438,384.00), computed as follows:

Base Price		$12,000,000.00
Less excluded assets [see a above]		7,317,566.00
		$ 4,682,434.00
Plus excluded liabilities		
Income tax	$ 19,284.00	
Workmen's compensation (per Exhibit N).	175,983.00	
Retirement Agreements	720,000.00	915,267.00
		$ 5,597,701.00
Cash payment		
Plus assumed liabilities		
Total liabilities	$ 7,855,950.00	
Less excluded liabilities	915,267.00	6,940,683.00
Price		$12,538,384.00

c. The book value of the fixed assets sold from Bowman to Dean was Ten Million Three Hundred Eight Thousand Five Hundred Forty-Six Dollars ($10,308,546.00), computed as follows:

[fol. 294]

All assets sold [see a above]		$19,096,851.00
Less current assets sold		
Receivables, less reserves	$ 5,806,267.00	
Inventories at lower of cost or market	2,522,301.00	
Prepaid expenses	459,737.00	8,788,305.00
Book value of fixed assets		$10,308,546.00

d. The price allocable to the fixed assets sold by Bowman to Dean was Three Million Seven Hundred Fifty Thousand Seventy-Nine Dollars ($3,750,079.00), computed as follows:

Total price to be paid [see b above]	$12,538,384.00
Less price allocable to current assets [see c above]	8,788,305.00
Price allocable to fixed assets having a book value of $10,308,546.00	$ 3,750,079.00

For purposes of determining the actual dollar balance owing from Dean to Bowman, all of the foregoing figures are subject to certain adjustments based upon changes from June 30, 1965 to closing and to the purchase price determination by auditors as provided in the Purchase Agreement.

Further affiant sayeth not.

Gordon Adamson.

Subscribed and Sworn to before me this 8th day of February, 1966.

William S. Myers, Notary Public.

[fol. 295] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1965

No. 970

FEDERAL TRADE COMMISSION, Petitioner,

v.

DEAN FOODS COMPANY, et al.

ORDER ALLOWING CERTIORARI—February 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is placed on the summary calender and set for oral argument on Monday, March 28, 1966.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 208618 644